SUPREME COURT, U. S.

FILED
DEC 7 1967
JOHN F. DAVIS, CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR CERTIORARI FILED AUGUST 10, 1967
CERTIORARI GRANTED OCTOBER 23, 1967

INDEX TO RECORD

	Page
I. Relevant Docket Entries	1
II. Complaint	6
Injunction Affidavit	13
Order	19
III. Motion To Dissolve or Modify Preliminary Injunction	22
IV. The Evidence:	

PLAINTIFFS' EVIDENCE

	Dir.	Cr.	Red.	Rec.
Fred Basehore	27	38	49	49
Fred Basehore			49	50
Fred Basehore			51	51
Motion To Dissolve Preliminary Injunction; Ruling				53

DEFENDANTS' EVIDENCE

	Dir.	Cr.	Red.	Rec.
Harold G. Deibler	54	64	71	73

PETITIONERS' EXHIBITS

1—Photograph Showing Store Entrances and Parking Lot	80
2—Photograph Showing Entrance No. 1 From Good's Lane	81
3—Photograph Showing Entrance No. 2 From Good's Lane	82

Washington, D. C. · THIEL PRESS · 202 · 393-0625

4—Photograph Showing Entrances Nos. 3, 4 and 5 From Plank Road 83

5—Photograph Showing Four Pickets .. 84

6—Photograph Showing Two Pickets .. 84

7—Photograph Showing Two Pickets .. 85

DEFENDANTS' EXHIBIT

1—Overall Map, Logan Valley Mall 86

V. Opinion of the Court 87

Order 99

VI. Majority Opinion and Judgment of the Supreme Court of Pennsylvania 101

Dissenting Opinion of Justices of Supreme Court of Pennsylvania..... 107

RECORD

IN THE COURT OF COMMON PLEAS
OF BLAIR COUNTY

No. 1915 in Equity

Logan Valley Plaza, Inc. and Weis Markets, Inc.,
Plaintiffs

vs.

Amalgamated Food Employees Union, Local 590, AFL-CIO, Penn Center Blvd., Pittsburgh, Pennsylvania, and John Doe and Richard Roe, Said Names Being Fictitious, True Names Unknown, Said Persons Being Officers, Employees, Agents, Servants and Pickets Employed by Defendant Union, and Any Other Individuals, Labor Unions or Labor Organizations Acting in Concert,
Defendants

I.

RELEVANT DOCKET ENTRIES

Complaint In Equity filed December 27th, 1965.

Dec. 27th, 1965, Plaintiff's Bond in the sum of $500.-00 filed. And Now December 27th, 1965, the

within Bond having been presented is, upon motion of John Woodcock, Jr., approved. By the Court, John M. Klepser, P.J.

Order

And Now, this 27th day of December, A.D. 1965, the plaintiff having filed a Complaint in Equity, together with injunction affidavits, and an injunction bond in the amount of Five Hundred Dollars ($500.00) which is hereby approved as required by law, it is Ordered and Decreed that a preliminary injunction shall issue as follows until further hearing on this matter:

The defendants, individually and collectively, the members of the defendant unions, their officers, representatives, servants, agents, employees and those working in concert with them, are enjoined from doing the following acts or any of them;

(a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc. Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the store room, porch and parcel pick-up area.

(b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exits leading to said parking area.

(c) Picketing at one time by more than —— —— pickets but in no event may pickets block in any manner entrances or exit areas to premises of both of the plaintiffs.

(d) Physically interfering with or preventing plaintiff Weis Markets, Inc. customers and delivery men and suppliers from entering or leaving plaintiff Weis Markets, Inc. store and parking area.

(e) Assaulting, threatening to assault or injure, or making insulting and threatening remarks, or injuring any of the plaintiff Weis Markets, Inc. employees, customers and delivery men and suppliers.

(f) Physically interfering with or preventing the plaintiffs employees from performing their duties as employees of the plaintiffs.

The 31 day of December, A.D. 1965, at 10 a.m. in Court Room No. 1, Blair County, Pennsylvania, is fixed as the time and place of hearing of plaintiffs' motion to continue the injunction.

By the Court,
John M. Klepser,
P. J.

Jan. 4, 1966, Motion to dissolve or modify preliminary injunction filed.

January 4, 1966, Testimony taken.

Feb. 14, 1966, Testimony taken January 4th, 1966 filed.

February 14, 1966, Opinion filed, with the following Order thereon:

Order

And Now, this 14th day of February, A.D. 1966, after hearing on the preliminary injunction heretofore issued in the above-captioned matter, at which hearing the defendant union was represented by counsel, and upon consideration of the testimony and exhibits adduced at said hearing, it is Ordered, Adjudged and Decreed that: (a) the defense motion to dissolve or modify said preliminary injunction be and the same is hereby denied and dismissed, and

(b) said preliminary injunction is hereby continued until further adjudication of this case or until further order of this Court, the security heretofore entered by the plaintiffs also to be continued.

By the Court,
(s) John M. Klepser,
P. J.

March 28, 1966, Affidavit of Service of Notice To Taking of an Appeal filed by John R. Strawmire, Esq., Attorney for Appellant, as follows:

March 28, 1966, Notice to Honorable John M. Klepser, President Judge of Blair County, that an appeal is taken to the Supreme Court, filed.

March 28, 1966, Notice to Stenographer, Court of Common Pleas, that an appeal to Supreme Court is taken, filed.

March 28, 1966, Notice to John Woodcock, Esq., and Sidney Apfelbaum, Esq., Attorneys for appellee, that an appeal to Supreme Court is taken, filed.

March 21, 1967, Majority and dissenting opinions of the Supreme Court of Pennsylvania and judgment filed.

II.

COMPLAINT

To the Honorable, the Judges of Said Court:

Logan Valley Plaza, Inc. and Weis Markets, Inc., Plaintiffs above named, complain of the Defendants and say:

1. Logan Valley Plaza, Inc., one of the plaintiffs is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the conduct of business for the purpose of construction, ownership and leasing retail storerooms and parking areas for vehicles of customers and business invitees of tenants, and having its principal place of business at 422 Lincoln Street, Johnstown, Cambria County, Pennsylvania.

2. Weis Markets, Inc. one of the plaintiffs is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the sale of food and sundry household articles, employing approximately two thousand two hundred persons in its business, and having its principal place of business at 1000 South Second Street, Sunbury, Pennsylvania.

3. The Defendant, Local Union No. 590, Pittsburgh, Pennsylvania of the Amalgamated Food Employees Union, AFL-CIO (hereinafter referred to

as the "Union"), is an unincorporated labor organization, with its principal office located at 201 Penn Center Boulevard, Pittsburgh, Pennsylvania.

4. The Defendants, "John Doe" and "Richard Roe", first and last names fictitious, true first and last names unknown to the Plaintiff, are officers, employees, agents and servants of the Defendant union and/or are employed by the Defendant Union, and upon information and belief the said Defendants have picketed and engaged in unlawful acts hereinafter stated and will continue to picket and engage in said unlawful acts at the behest of the Defendant Union and at the direction of the Defendant's officers and agents and with full knowledge, acquiescence and consent of said Defendant Union.

5. In addition to the aforesaid Defendants, there are, engaged by and acting for and on the behalf of and for the benefit of and at the instance and direction of the Defendants named herein, certain and various other persons whom both of the Plaintiffs are presently unable to identify by name, and who have been and who are presently participating in the acts and course of conduct hereinafter complained in conjunction, concert, and conspiracy with the aforesaid Defendants.

Plaintiffs are without knowledge and without means to ascertain the precise number or the identities of the members of the Defendant Union or of the precise identity or number of the other labor organizations and unions and the individuals, agents

and officers thereof acting in concert with the Defendant Union, and it is, therefore, impossible to name them as party defendants in this suit.

6. Commencing December 17, 1965, the Defendants, through their officers, servants, agents and employees, as well as employees of A. & P. Supermarkets and others, have conspired and combined unlawfully to interfere with the Plaintiffs' businesses by engaging in the following unlawful acts and conduct at a certain supermarket owned by Weis and opened for business December 8, 1965, said Weis Supermarket being located at and surrounded by the property of the other plaintiff known as Logan Valley Plaza, Inc., Altoona, Pennsylvania, all of which more clearly appear in the affidavits attached hereto.

(a) They have caused large number of persons to congregate in front of and about the entrances of the Weis Markets, Inc. store restricting said Plaintiff's employes, customers and other persons having lawful business therein, from entering or leaving said Plaintiff Corporation's premises.

(b) They have caused large numbers of persons to congregate in front of and about the parking and customer loading areas of the Weis Markets, Inc. store, thereby interfering with and restricting said Plaintiff's employees, customers and other persons having lawful business therein from parking their vehicles and entering and leaving said plaintiff's parcel pick-up zone.

7. Upon information and belief that the persons who have been and who are presently participating in the acts and course of unlawful conduct complained of are officers, servants, agents and employees of the Defendant, and are comprised of employees of the A. & P. supermarket and others on Plank Road, Altoona, Pennsylvania, competitors of Weis Markets, Inc., one of the Plaintiffs, the purpose of such unlawful conduct being to disrupt and interefere with said Plaintiff's business, resulting in the loss of good will of said Plaintiff's customers and a reduction of sales, all to the unlawful and unfair competitive advantage of A. & P. supermarket on Plank Road, Altoona, Pennsylvania, and others.

8. Plaintiff is the owner-occupant of property located at the Logan Valley Plaza, Altoona, Pennsylvania, comprising a store proper, a porch across the front thereof and certain defined portions of the parking lot parcel pick-up area as well as record-grantee by virtue of certain documents of title in the form of reciprocal easements and privileges related to parking areas owned by plaintiff Logan Valley Plaza, Inc.

9. Along one side of these premises there is a public thoroughfare known as Plank Road which contains a wide developed and level berm; along another side of these premises is a public thoroughfare known as Goods Lane which contains a wide developed and level berm.

10. Both of the Plaintiffs have informed the Defendants that they are to cease trespassing on

the porch parcel pick-up areas and parking lot and have advised them to remove themselves to the berm on the public thoroughfare where they may engage in reasonable, orderly and lawful picketing.

11. Plaintiff, Weis Markets, Inc., has caused notice in writing to be posted upon its premises specifically advising that there be no trespassing by persons other than Weis employees upon the property and premises of the Plaintiff, Weis Markets, Inc.

12. Notwithstanding said notice to desist, Defendants have persisted and still do persist in committing the foregoing acts of trespass.

13. Upon information and belief Plaintiffs aver that the Defendants intend to continue with their illegal trespassing notwithstanding there are well-developed berms on public thoroughfares available on two sides of Plaintiffs' premises which may be used by said Defendants for reasonable, orderly and lawful picketing.

14. By virtue of the aforesaid unlawful picketing and trespass Defendants have seized Plaintiffs' property and deprived them of its use.

15. By reason of the Defendants' unlawful acts, the Plaintiffs have suffered and will continue to suffer great and irreparable damages, though the amounts of which cannot now be definitely ascertained, in respect to the following, among other things:

(a) Property of both of the plaintiffs will be further harmed or destroyed.

(b) The supermarket business of one of the plaintiffs, Weis Markets, Inc., will continue to be disrupted and said Plaintiff will be unable to adequately supply the needs of its customers, and said Plaintiff will therefore lose the good will of its customers.

(c) Competitors of Plaintiff Weis Markets, Inc., namely, the A & P supermarket and others on Plank Road, located only one-half mile from said Plaintiff's premises, and drawing its customers from the same customer area as said Plaintiff, will gain an unjust and unlawful business advantage by virtue of the unlawful activities of its employees, agents and servants.

(d) Weis Markets, Inc., one of the Plaintiffs will lose great sums of money, the amounts of which will not be definitely ascertainable, due to its inability to continue its business by reason of the Defendants' unlawful interference with said business.

(e) Logan Valley Plaza, Inc., one of the Plaintiffs will lose great sums of money, the amounts of which will not be definitely ascertainable, due to its inability to peacefully conduct and continue its business of construction and rental of buildings as well as furnishing of parking areas for vehicles free from interference of trespassers who are unlawfully interrupting the peaceful conduct of business.

16. There is not presently and there never has been a labor dispute between Plaintiff Weis Markets, Inc., and the Defendant Union.

17. The Plaintiffs have no adequate remedy at law, and will suffer irreparable loss and damage unless Defendants be preliminarily until hearing and thereafter perpetually enjoined as is more fully hereinafter set forth.

Wherefore, Plaintiffs pray your Honorable Court for the following relief:

1. That your Honorable Court enter a decree preliminarily until hearing and thereafter perpetually enjoining the Defendants individually and collectively, the members of Defendant Union, their officers, representatives, servants, agents and employees, and any other person or persons acting in concert with them or otherwise participating in their aid, from doing the following acts or any of them:

(a) Picketing and trespassing on the premises of the Plaintiff Weis Markets, Inc., and also the premises of Logan Valley Plaza, Inc., also plaintiff herein, in Altoona, Pennsylvania.

(b) Picketing by more than two persons on each of the berms on the public thoroughfares adjoining the Plaintiffs' premises.

(c) Physically interfering with or preventing the customers of Plaintiff Weis Markets, Inc., from entering or leaving the said Plaintiff's store.

(d) Physically interfering with or preventing the customers of Weis Markets, Inc., from entering or leaving the customer loading area or parking lot adjacent to the store of Plaintiff Weis Markets, Inc.

(e) Trespassing upon the property of Plaintiff Logan Valley Plaza, Inc.

2. That the Defendants pay the costs of these proceedings.

3. Such other and further relief, including pecuniary damages, as your Honorable Court may deem just and proper.

And your Plaintiffs will ever pray, etc.

Sidney Apfelbaum,
Robert Lewis,
Norman Krumenacher,
John Woodcock,
Attorneys for Plaintiffs.

Commonwealth of Pennsylvania,
County of Northumberland, *ss:*

Micheal C. Rheam, being duly sworn according to law, deposes and says that he is the Vice-President and Secretary of Weis Markets, Inc., the within plaintiff, and that he is authorized to make this affidavit on behalf of the plaintiff corporation; that these facts within his knowledge set forth in the foregoing complaint are true and correct and that those facts not within his personal knowledge he

believes to be true and expects to be able to prove the same at the trial of this case.

Michael C. Rheam

(Jurat)

Commonwealth of Pennsylvania,
County of *ss:*

Stephen J. Siciliano, by his attorney John Woodcock, being duly sworn according to law, deposes and says that he is President of Logan Valley Plaza, Inc., and that he is authorized to make this affidavit on behalf of the plaintiff corporation; that these facts within his knowledge set forth in the foregoing complaint are true and correct and that those facts not within his personal knowledge he believes to be true and expects to be able to prove the same at the trial of this case.

Stephen J. Siciliano by John Woodcock his attorney

(Jurat)

[Plaintiffs' Bond Omitted]

County of Blair,
State of Pennsylvania, *ss:*

My name is Kenneth Bartlett, of 531 Pine Street, and I am an employee of Weis Markets, Inc., store located at Altoona, Pennsylvania.

On the evening of December 21, 1965, which was a Tuesday night.

I was working when I saw one of the men who had been on the picket line, and he was then inside the Weis store talking to a customer.

Kenneth Bartlett

(Jurat)

County of Northumberland,
State of Pennsylvania, *ss.:*

My name is Alex T. Baceski, and I work for Weis Markets, Inc.

At approximately 6:40 p.m., on December 22, 1965, I observed a man who had been on the picket line carrying a card, and when I observed him he was inside the Altoona Weis store. He was halfway down the produce aisle, and headed further into the store. He had no sign on at this time.

I went up to him and asked, "Haven't I seen you on the picket line?" He said, "Have you?" I said, "Yes, I have. You are not welcome in here."

He said, "Can't I even see the store?" I repeated, "you are not welcome here."

He walked out to the porch of our store and then to the pick-up zone, and I observed him secure a sign from another picket who was carrying a couple

of signs, put one on, and started to walk as a picket in front of the store.

Alex T. Baceski

(Jurat)

Commonwealth of Pennsylvania,
County of Northumberland, ss:

Fred Basehore, being duly sworn deposes and says:

I reside at R D No. 2, Lewisburg, Pennsylvania. I am the Assistant General Superintendent for Weis Markets. I was at the Weis Supermarket in Altoona, Pennsylvania the week of December 13-17, 1965 to supervise that store's opening operations. On Friday night, December 17, 1965, a group of men commenced picketing in the area directly in front of the entrances to the store, more particularly in the customer loading area immediately adjacent to the store's porch. There were between 4 and 7 pickets walking at all times. The pickets were wearing signs which read "Weis Markets is non-union. These employees are not receiving union wages or other benefits. Amalgamated Food Employees Union Local 590." At approximately 8:00 p.m. a person, later, identified to me as Charles Toth, a union organizer, arrived on the scene. I was told by one of Weis' suppliers that Mr. Toth was a former A & P meat manager.

Between 8 and 9:00 p.m. there was a great deal of confusion and congestion at the area where the pickets were walking. Since the pickets were in the customer loading area, customer cars could not pull into the area at normal speed, nor could they leave until they had been delayed for some time. As a result, cars and customers were lined up by the loading area awaiting service. At approximately 9:00 a car pulled into the customer loading area. The occupant of the vehicle began talking to Toth. One of the pick-up boys came into the store and told be that this car was blocking the customers from entering or leaving the pick-up area, and that car loading was at a standstill. The pick-up boy told me that the occupant of the car was the store manager of the A & P store on Plank Road. I immediately went outside and approached the car. I told the occupant to move his vehicle out of the pick-up area. He replied, in a rough and abrasive manner, "Are you telling me, or asking me". I replied, "If that's the way you want it, I'm asking you, will you please move your car up out of the way". At that time I had brushed the arm of Mr. Toth. He immediately yelled at me, in a threatening manner, "Don't you touch me," I replied, "What did you say," He repeated the warning, "Don't you ever touch me." The car then pulled away, and I walked back into the store.

On Saturday, December 18, 1965, the pickets arrived at approximately 10:00 a.m. At 10:50 I was told that one of the pickets worked at the Plank

Road A & P. Later in the day, I was told by a customer that at least 3 of the 4 pickets then present were employed at the Plank Road A & P.

As was the situation on December 17, the flow of traffic to and from the pick-up area was hindered because of the activities of the pickets in this area. Customers had to wait until the pickets got out of the way before they could move their cars into the loading area and once loaded had to wait and avoid the pickets in order to leave.

On Monday, December 20, 1965, the pickets arrived at approximately 6:00 p.m. The traffic situation at the loading area became congested as it had been on Friday and Saturday. The pickets walked two and three abreast, and cars could not pass until they had moved away. As a result, I noticed on two occasions within a five minute period that three cars had to wait to park their cars in the parking area near the pick-up area. By 7:15, the number of pickets had increased to ten, and they were wandering in and out of the pick-up area to within two feet of the porch.

At that point a boy in the pick-up zone was told by a picket that they are going to run us out of town. At about 6:05 p.m. I left the store and approached one of the pickets. I asked him whether he intended to picket tonight. He replied, "yes". I told him that he was picketing in our parking lot, and if he wanted to picket that he should go out to the berm. The man replied that he thought this was

Crown's parking lot. I told him that this was our parking lot. He then asked where our lot ends. I told him the entire lot was ours, right out to the berm, and that he should picket there if he intended to continue picketing.

On December 21, 1965, the pickets arrived at approximately 10:30 a.m. At 10:30 a.m. the pickets stopped and talked to a customer who was about to enter the store. At about 10:35 the meat manager of an A & P store approached the pickets, and they engaged in a conversation. The manager then came into store and comparison shopped our meat prices. All the pickets at this time were from the A & P on Plank Road.

At about 2:00 the pickets were joined by four girls wearing signs. The girls picketed on the loading porch by the entrances to the store. Later they proceeded to walk four abreast in the pick-up zone, effectively blocking the flow of traffic in and out of that area.

I have read the above and it is true to the best of my knowledge and belief.

Fred Basehore

(Jurat)

ORDER

And Now, this 27 day of December, A.D. 1965, the plaintiff having filed a Complaint In Equity, to-

gether with injunction affidavits, and an injunction bond in the amount of Five Hundred Dollars ($500.00) which is hereby approved as required by law, it is Ordered and Decreed that a preliminary injunction shall issue as follows until further hearing on this matter:

The defendants, individually and collectively, the members of the defendant unions, their officers, representatives, servants, agents, employees and those working in concert with them, are enjoined from doing the following acts or any of them:

(a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area.

(b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exits leading to said parking area.

(c) Picketing at one time by more than ——— pickets but in no event may pickets block in any manner entrances or exit areas to premises of both of the plaintiffs.

(d) Physically interfering with or preventing plaintiff Weis Markets, Inc. customers and delivery men and suppliers from entering or

leaving plaintiff Weis Markets, Inc. store and parking area.

(e) Assaulting, threatening to assault or injure, or making insulting and threatening remarks, or injuring any of the plaintiff Weis Markets, Inc. employees, customers and delivery men and suppliers.

(f) Physically interfering with or preventing the plaintiffs employees from performing their duties as employees of the plaintiffs.

The 31 day of December, A.D. 1965, at 10 a.m., in Court Room No. 1, Blair County, Pennsylvania, is fixed as the time and place of hearing of plaintiffs' motion to continue the injunction.

By the Court:
John M. Klepser,
P. J.

III.

MOTION TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION

To John M. Klepser, President Judge of Said Court:

And now, this 4th day of January, 1966, the defendant, by its attorney, John R. Strawmire, Esquire, moves the Court to dissolve the Preliminary Injunction formerly entered in this case or to modify it for the following reasons:

1.

That the matter here in question grows out of a labor dispute as defined by the "Labor Anti-Injunction Act" Act of June 2, 1937, P. L. 1198 §§1, 2 and 3. The labor dispute here involved is a controversy concerning the terms and conditions of employment for the employees of the plaintiff, Weis Markets, Inc. at their Store No. 40 located at Logan Valley Mall, Altoona, Pennsylvania. That constituting such a labor dispute within the terms of said Act, your Honorable Court is without jurisdiction to issue any restraining order or temporary or permanent injunction relating to said labor dispute.

2.

That the activity here complained of amounts to nothing more than peaceful, informational

picketing by Union Members for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc. at said store and as such, is constitutionally protected by the Labor Anti-Injunction Act and should not be enjoined.

3.

That said conduct is not calculated to coerce the plaintiff-employer to compel his employees to prefer or become members of the defendant-union.

4.

That such conduct is not unlawful picketing or mass picketing or amounting to a seizure within the meaning and construction of the Labor Anti-Injunction Act.

5.

That the requirements of equitable jurisdiction have not been shown in that the plaintiffs have failed to show that immediate and irreparable injury would be sustained to it before notice could be given to the defendant or a hearing held on the matter. That such immediate and irreparable injury means immediate, injurious consequence to the plaintiffs that cannot be repaired under any standard of compensation. That such peaceful and lawful picketing as here engaged in by the defendant should not be enjoined merely because of an economic loss to the plaintiff-employer may result therefrom. That said economic loss is com-

pletely compensable in money damages and as such, a complete and adequate remedy at law exists for the plaintiffs to rely upon. That the area whereon the defendant was conducting a peaceful and lawful picketing is a shopping center, pedestrian and parking area and as such, constitutes quasi-public property even though privately owned. Such quasi-public property under Pennsylvania Law is a proper situs for peaceful picketing and as such, the normal rules governing trespass actions do not apply.

6.

That the defendant has not caused large numbers of persons to congregate in front of and about the entrances of Weis Markets, Inc. nor has the defendant been guilty of any unlawful act as defined by the Labor Anti-Injunction Act.

7.

That by granting the relief of a Preliminary Injunction without notice or hearing, greater injury is now being inflicted upon the defendant by the granting of said relief than would have been inflicted upon the plaintiffs by the refusal of said relief in that the defendant's ability to inform the public has been impaired and harmed by the ability of the plaintiffs to obtain Preliminary Injunction without notice or hearing based upon the improper, inaccurate, false and misleading affidavits. In being required to picket on public property at the entrances to the shopping center area, the pickets

are required to stand on the berm of heavily traveled roads which creates an extremely dangerous situation for them and further, their picketing indirectly affects other tenants of the Logan Valley Plaza, Inc. Shopping Center which in no way is desired by the defendant. Said injury is substantial and irreparable for which there can be no adequate remedy.

8.

That said Preliminary Injunction Order as issued is improper for the reason that it fails to provide any restraints upon the plaintiffs to prevent them from retaliation in any form against those employees who have participated or will participate with the defendant actively or passively in their peaceful and lawful picketing.

9.

That said Preliminary Injunction Order as issued is improper for the reason that said Order in no way prevents or enjoins the plaintiffs or its employees from any acts of threats of violence, intimidation, coercion, molestation, libel or slander against the defendant.

10.

That by reason of the foregoing, said Preliminary Injunction Order does not preserve the status quo as is required by equity but rather gives to the plaintiffs an unwarranted and unreasonable advantage in this current labor dispute.

Motion To Dissolve or Modify Preliminary Injunction

11.

That by reason of the Labor Management Relations Act, 29 USCA §§141 et seq., your Honorable Court is without jurisdiction in this labor dispute whatsoever in that said Act by providing a method and remedy of correcting an unfair labor practice has removed this type of labor dispute from the sphere of state action and thereby precludes your Honorable Court from entering any decree whatsoever in this matter.

Wherefore, the defendant respectfully prays your Honorable Court to forthwith dissolve the Preliminary Injunction heretofore issued in this matter or in the alternative to modify said Order so as to more adequately maintain the status quo between the parties and further, that the defendant be allowed to peacefully picket on the property of the plaintiff, Logan Valley Plaza, Inc., it being quasi-public property. In addition thereto, the defendant respectfully prays your Honorable Court, if said Preliminary Injunction is modified and continued, that said Injunction Bond as heretofore filed by the plaintiffs be ordered increased to the sum of Five Thousand ($5000) Dollars.

John R. Strawmire,
Attorney for Defendant.

(Affidavit)

IV.

THE EVIDENCE

John M. Klepser, President Judge.

John Woodcock, Esquire, Counsel for Logan Valley Plaza, Inc.

Robert Lewis, Esquire, Counsel for Weis Markets, Inc.

John R. Strawmire, Esquire, Counsel for Defendants.

Transcript of Testimony taken January 4, 1966.

MR. WOODCOCK: If your Honor please, I move that Robert Lewis, Esquire, a member of the New York Bar, be admitted specially for the trial of this case.

THE COURT: Motion is granted.

MR. FRED BASEHORE, after having been duly sworn according to law was examined as follows:

Direct Examination

BY MR. LEWIS:

Q. What is your full name?

A. Fred Basehore.

Q. By whom are you employed?

A. Weis Markets.

Q. What is your position?

A. Assistant General Superintendent for the Northern Division.

Q. What are your duties?

A. *I oversee the entire operation for* Weis Markets in these particular markets.

Q. Do you know on what date a store was opened to the public for the first time in Altoona?

A. Yes, December 8th.

Q. Where is this store located?

A. On Logan Valley Boulevard.

Q. On December 8th of what year?

A. 1965.

Q. What is the street address of that store, do you know?

A. Plank Road, Logan Valley Mall.

Q. Were you present at this store on the evening of December 17, 1965?

A. I was.

Q. Did anything unusual happen at that time?

A Yes, shortly after six o'clock I noticed four gentlemen appeared wearing signs.

Q. How long did they remain there?

A. Until closing time.

Q. What time is closing time?

A. That is 10:00 o'clock.

Q. 10:00 o'clock p.m.?

A. Yes.

Q. Do you recall the wording on these signs?

A. Yes. "Weis Markets is non-union. These employees are not receiving union wages or benefits. Amalgamated Food Clerks Union, Local 590."

Q. Approximately where were they standing with relation to the store?

A. In our parcel pick-up zone, which is approximately 5 feet from the porch.

Q. What is the parcel pick-up zone used for?

A. We use it strictly for customers to come and enter to pick up their parcels which they had purchased.

Q. Do they come in any vehicle?

A. Oh yes.

Q. They drive in?

A. They drive in to this particular area, and there the groceries are loaded into the cars by our boys on what we call pick-up duty.

Q. Is this area marked in any way?

A. It sure is. Very plainly marked.

Q. What does it say?

A. "Parcel pick-up." And it has a bold double line right down there.

Q. On the night of December 17th were the pickets walking in this vicinity?

A. They were.

Q. Were the cars moving in this vicinity?

A. Yes.

Q. Sporadically or continuously, or how often?

A. Mostly continuously as it was a Friday night, which is quite busy.

Q. Did you observe what occurred at this time?

A. I did.

Q. Where were you standing?

A. I was inside the store as well as out. I was right out on the porch with the boys helping to unload because there was quite a congestion.

Q. All right then, how far away from the pickets were you at this time?

A. Oh, at this time it might have been 5, 6 feet.

Q. How far away from the parcel pick-up zone were you?

A. I was right up to it, I was right at the edge of the porch.

Q. Will you describe what happened, that is, on the evening of December 17th?

A. Yes. These pickets arrived and naturally caused quite a concern on my part as it was causing congestion out there and customers were milling around trying to get in as well as leave. After they had the groceries loaded in the car they had a problem of waiting until some of the pickets stepped out of the way that they could leave the zone. Then I recall another incident around nine o'clock when I was in the store and one of the boys came out and said, "Our pick-up zone is completely halted." And I said, "It is, what is the trouble?" As I was going out the door to check on this incident the boys said, "It is the Manager from the A & P, he is parked in our pick-up zone." And he was parked in a position that the cars couldn't enter or leave. So I went over to the man, and I said to him, "Will you move your car out of the way?" And he very sharply turned to me and says: "Are you asking me or telling me?" I said, "If this is

the way you want it I am asking you, will you please move your car out of the way?" It was causing quite a congestion so the gentleman did move.

Q. Now when cars enter your pick-up zone do you know what rate of speed they are traveling?

A. No, I wouldn't be able to tell you in miles per hour what rate of speed. No I wouldn't be able to answer that.

Q. Would you be able to answer whether cars entering the pick-up zone travel at approximately the same rate of speed as cars entering the parking lot itself on the main road?

A. Yes, I would say that, as they come around the corner from Sears they would, yes, sir.

Q. What is your answer?

A. I would say the same rate of speed as they enter our entrance out at the berm, out at the highway.

Q. It would be the same rate of speed as they enter?

A. (Interposing) As they would come around the corner into the pick-up zone, yes.

Q. You refer to the Manager of an A & P Supermarket, what A & P Supermarket is this?

A. That is the one on Plank Road about a half mile from the store.

Q. Has this picketing that you have ascribed as occurring on December 17th continued after the 17th?

A. It has.

Q. To what time?

A. They didn't picket the day before Christmas but then they came back the following week.

Q. Did they picket up until the time that the court issued an injunction in this matter?

A. They did, with the exception of the day before Christmas.

Q. And then where did the picketing occur after the injunction was issued?

A. Out on the berm.

Q. Have there always been 4 pickets?

A. It has varied.

Q. From what number?

A. Very seldom less than 4, but we have had as high as 13 I recall on the night of December 21st, a Tuesday night.

Q. Where were these 13 people picketing?

A. On our parcel pick-up area.

Q. Were they marching single file or abreast of each other?

A. They were marching abreast.

Q. How many were abreast?

A. Two, and sometimes they would go into 3 or 4.

Q. How close did they come to the porch?

A. As close as 2 feet.

Q. Were they ever on the porch itself?

A. There were occasions when they had stepped up on the porch. There was a couple girls on the day of the 21st, in the afternoon, they stepped up on the porch.

Q. Have you ever spoken to the pickets?

A. Yes, on one occasion, on Monday night, December 20th. Shortly after six o'clock I saw the pickets arrive, I walked up and approached the one gentleman who I thought was in charge of them,

and I said to him, "Do you intend to picket here?" He answered he was or he had intended to. I said to him, "Do you know you are picketing on private property?" And he said, "No, this belongs to Crown Construction." I said to him, "No, this property belongs to Weis Markets." He said, "Where does Weis Market's property end?" So I said, "Out along the highway right at the edge of the macadam." And I said, "If you want to picket do your picketing out there." And I immediately turned and left, I said no more and nothing was said to me.

Q. What did he do if anything?

A. They continued their picketing.

Q. Do you have a Sign posted on your property prohibiting picketing?

A. Yes.

Q. Or trespassing?

A. Yes.

Q. What does the Sign read?

A. "No trespassing or soliciting is allowed on Weis Market porch or parking lot by any one except Weis employees without the consent of the management."

Q. Do you know who is the property owner of the store proper itself?

A. Yes, Weis Markets.

Q. And the porch?

A. Weis Markets.

Q. And the parcel pick-up zone?

A. Weis Markets.

Q. And the parking lot?

A. Weis Markets.

Q. Now where is this Sign posted that you referred to previously?

A. Right between the entrance and the exit doors.

Q. When was it posted?

A. Just a few days after the opening.

Q. Which was when? December 8th?

A. December 8th when we opened. So it was a few days after that.

Q. Are you familiar with the property around the area of the store?

A. I am.

Q. I show you Petitioner's Exhibit No. 1 for identification and ask you if you would describe this property? What does it show?

A. It shows our parking lot to the west side and our store with two entrances on the west side. Now this is from Plank Road looking, I would say, North.

MR. STRAWMIRE: For clarification, to the left is Good's Lane?

A. That is correct.

Q. Anything else?

A. No, other than the two entrances here.

Q. All right, now referring to the two entrances would you identify them? What would be Entrance No. 1?

A. Back where you see a station wagon, it is a white top with dark bottom, that would be Entrance No. 1, and Entrance No. 2 would be this way (pointing). It looks like a jeep truck or something parked along the side, that is Entrance No. 2 off of Good's Lane.

Q. What would you say the distance was between the store itself and those two entrances?

A. About 350 feet.

Q. Did you mark them off, the feet?

A. Yes, I did.

Q. When did you mark them off?

A. I did this morning.

Q. I show you Exhibit No. 2 for identification and ask you to describe what that shows?

A. That is Entrance No. 1 off of Good's Lane, the same one as I identified before with that station wagon which I thought was a complete white top but it has white trim, and it shows our entranceway.

Q. What is the width of that entranceway?

A. Approximately 20 feet.

Q. Does it show any berm?

A. Yes.

Q. What is the width of that berm?

A. The berm right there is about 15 feet wide.

Q. Now what berm are you referring to?

A. The one from the highway to the edge of the ditch.

Q. Is there anything on this berm?

A. Only a Sign, "No parking at any time."

Q. What is the width of that berm?

A. Approximately 15 feet.

Q. Is there any other berm showing in that photograph?

A. Well, there is a berm before you enter this particular entrance which would be, I would say, South towards Entrance No. 2.

Q. Do you know what the width of that berm is?

A. The same, it carries right up through.

Q. Is that right in the foreground of the picture, on the lower part of this exhibit?

A. Yes, that is right.

Q. I show you Exhibit No. 3 for identification and ask you to describe what that shows?

A. This is just looking the opposite way now, looking down Good's Lane towards Plank Road, or 220, which there is a Sign there says "Junction 220", and that is our second entrance, what we call No. 2 Entrance off of Good's Lane, showing the berm, and there is that truck that I identified before as being near Entrance No. 2.

Q. I show you Exhibit No. 4 for identification and ask you to describe what that is?

A. This is on Plank Road, 220, looking at the Sears Service Center where there are two entrances close together, and there is the fifth entrance in the lot clear down there at the top of, well about the center of the picture, you see a car leaving the pick-up zone or leaving the parking lot, that is the first entrance into the shopping center.

Q. Would you identify those entrances as 3, 4 and 5?

A. Yes, the one closest to the bottom would be 3, and then 4, and 5 would be the uppermost entrance.

Q. That uppermost entrance, is that where a car is making a right-hand turn onto Route 220?

A. Yes, that is correct. That is the fifth entrance.

Q. Is there any berm in this photograph?

A. Yes, the berm isn't quite as large as over at the other place but I would say it runs around 12 feet.

Q. In width?

A. In width, yes.

Q. And does that berm continue on up to the fifth entrance?

A. Yes, right on through.

MR. LEWIS: I offer these 4 exhibits in evidence as Petitioners' Exhibits 1, 2, 3 and 4.

MR. STRAWMIRE: For what they show, your Honor please, I have no objection.

THE COURT: Let the exhibits be admitted.

Q. Do cars traveling on Plank Road or Good's Lane travel on the berms at all?

A. No.

Q. What do they travel on?

A. On the highway.

MR. STRAWMIRE: If the Court please, that would be objected to. We would assume that the cars would travel on the highway and not on the berm.

MR. LEWIS: All right, we will take the assumption and continue.

Q. Is Weis Markets involved in a labor dispute with Amalgamated Food Employees Union, Local 590?

A. No, they are not.

Q. Are any of the pickets that you have observed picketing in front of the store employees of Weis Markets?

A. No.

Q. Were they ever employees of Weis Markets?

A. No.

Q. Did you ever recognize any of these pickets?

A. Not personally that I have ever known.

Q. Were you ever told who they were?

A. Yes, I was given names.

Q. And who were they?

MR. STRAWMIRE: If your Honor please, that is objected to, if someone told him it would be hearsay.

MR. LEWIS: All right, I withdraw the question, and that is all I have.

Cross-Examination

BY MR. STRAWMIRE:

Q. Mr. Basehore, you are the Assistant General Superintendent for Weis Markets in what area?

A. The Northern area, sir, it covers 29 stores.

Q. Where do you reside?

A. Lewisburg, R. D. 2.

Q. You are not a resident of this area?

A. No.

Q. You have been in this area since this store opened?

A. As I always am at a new store opening, yes.

Q. And how long? Have you been here constantly since the store opened?

A. No, I haven't.

Q. You have other duties, don't you?

A. That is correct.

Q. You stated that the pickets have varied in numbers between 4 and 13?

A. Yes.

Q. What is the average number?

A. I would say 6 and 7.

Q. And that is while they were picketing in and about the store area, is that correct?

A. 13 were in and about the store area.

Q. Were there 6 and 7 in and about the store area too?

A. Yes.

Q. How many were picketing out at the berm?

A. 5 and 6.

Q. At what entrances?

A. At each entrance, well there is maybe 2; 1, 2; 2 or something like that.

Q. Well now, that doesn't explain too much. At what entrances?

A. At each entrance there has been pickets.

Q. You have testified as to entrances 1, 2, 3, 4 and 5?

A. All right, now I couldn't give you—

Q. (Interposing) Which is the main entrance would you say from Plank Road by number, which would be the main entrance?

A. I would say at 5.

Q. 5 would be the main entrance?

A. Off of Plank Road.

Q. And on Exhibit No. 4 you can barely see Entrance No. 5 can you?

A. You can see it as you can see the cars coming out of that entrance.

Q. You can see but you can't see how wide it is and so forth?

A. It is the same as the rest of them, sir.

Q. It is the same as the rest of them?

A. Yes, the entrance is approximately 20 feet wide and the berm carries the same down through.

Q. And then entrances 3 and 4 are entrances primarily to the Sears Gas Station or Service Center, is that right?

A. I would say 3 is, Entrance No. 4, people use that also to go into the Center.

Q. Exactly. No. 4 is utilized also to go into Weis Market and to Sears, is that correct, the store proper?

A. Yes, I would say primarily Sears off of that particular entrance.

Q. Entrance No. 2 is utilized by people going to both places of business, is that correct?

A. Yes.

Q. And Entrance No. 1 the same way?

A. Yes, I would say primarily that is the people coming into our Store but it can be used for both, that is correct.

Q. Do you know how many people use which entrance to go to which store?

A. I couldn't give you an honest answer.

Q. No, it would be rather difficult, wouldn't it?

A. Yes, it would be rather difficult.

Q. So that there are people coming into all the entrances and going to both of the stores, is that correct?

A. Yes.

Q. You stated that Weis Markets owns the store parking lot, is that right?

A. That is right.

Q. Do you know under what legal arrangement Weis Markets has any interest in the parking lot?

A. No, other than they own the property.

Q. You don't know, do you?

A. I know they own the property.

Q. How do you know they own the property?

A. How do I know? Because I have been told it is our property.

Q. You have been told. You don't know of your own knowledge what they own, is that correct?

A. I know that if they tell me they own the property they own the property.

Q. What you have been told, is that correct?

A. That is right.

Q. If I state that in the Complaint or in the order of court which was prepared by the attorneys for Weis Markets it states:

> "Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exits leading to said parking area."

And it further states:

> "Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area."

Would you say that the attorneys for Weis Markets would be wrong?

MR. LEWIS: Objection. I don't think it is proper for a witness to characterize whether the attorneys are right or wrong.

MR. STRAWMIRE: I will withdraw the question, if your Honor please.

Q. The fact is that you do not know under what legal arrangement the ownership of the land or store or anything there is except by what someone has told you, is that correct?

A. Yes.

Q. You have never seen a deed, you have never seen any agreement between Logan Valley Plaza, Inc. and Weis Markets have you?

A. Yes, I have seen an agreement.

Q. What is the date of that agreement?

A. That I couldn't answer.

Q. What does the agreement provide?

A. It provides the Center may use the property for installing a parking lot, any drainage lines, or what have you that has to be utilized in building a shopping center.

Q. Who is the agreement between?

A. I would say Weis Markets and Crown Construction Company.

Q. I don't know of any such agreement. Mr. Basehore, what is the distance between Entrance No. 1 and Entrance No. 2?

A. Sir, I couldn't give you that in footage, I don't know.

Q. You said you measured it off 350 feet?

A. From the store to the Number 1 entrance there, that is what was stated.

Q. I misunderstood you. From Weis Market store building?

A. That is right.

Q. To Number 1 entranceway?

A. That is correct.

Q. Is 350 feet?

A. Yes, approximately.

Q. From the store to Number 4 entranceway, how far is it?

A. That I could not answer, sir, I do not know.

Q. Is it further or less distance than 350 feet?

A. I would say it is further, sir.

Q. From the store to Entrance No. 5, which you have described as being the main entrance is a distance of how far?

A. It is even further, sir.

Q. It is even further?

A. Yes.

Q. Would it approximate perchance up to 450 feet or 500 feet?

A. Yes.

Q. You say on December 17th four men arrived with Signs and they located themselves on the parcel pick-up zone?

A. Correct.

Q. Did that halt your store business?

A. No, it didn't halt it, but it sure involved a lot of I would say constant navigating by customers in and out, and in fact I have even heard comments from customers on this.

Q. What did the customers comment?

A. They wanted to know why the people were out there and she said she almost hit one of them.

Q. She almost hit one of them?

A. Yes.

Q. And they were in your parcel pick-up area?

A. Right.

Q. And that is located right next to your porch?

A. Yes it is, right adjacent, right beside it.

Q. And next to that area then there is 2 lanes of traffic, next to the parcel pick-up area would there be 2 lanes of traffic?

A. There could be 2 cars pass there yes.

Q. Now you have stated that the speed of cars at that area is the same as speed of cars entering from Plank Road?

A. They have come down along Sears there, sir, and they turn on the pick-up area yes.

Q. They have at times; is that what you are saying?

A. Oh yes.

Q. You say that speed there is always the same as speed of cars entering from Plank Road?

A. It will vary, even somebody entering into Plank Road could be going at excess speed.

Q. Are you familiar with Plank Road?

A. Yes, I am.

Q. It is a pretty heavily traveled highway, isn't it?

A. It certainly is.

Q. And the cars move with very good speed too, don't they?

A. On Plank Road they do yes, but you can not navigate a turn properly by excess speed as you enter the lot too.

Q. Do you have a picture of the main entrance-way, Number 5?

A. It is shown on Number 4.

Q. Do you have a separate picture of Entrance No. 5?

A. No, we don't.

Q. Now you relate one incident where a car stopped and Mr. Toft I believe—I don't think you did mention the name?

A. No, thank you, I didn't.

Q. You mentioned one incident where a car stopped and someone was talking to the occupant of that car, and you identified the operator of the car as being the Manager of the A & P Supermarket where?

A. Plank Road.

Q. You didn't know him, did you?

A. I had seen him before in his store, yes.

Q. You saw him before at his store?

A. Yes.

Q. You were in his store were you?

A. Yes, I was.

Q. What were you doing in his store?

A. Just looking around.

Q. Just like some of these people were looking around your store?

A. Yes.

Q. Were you comparison shopping?

A. No, I didn't make any notes as far as that goes.

Q. You looked around his store to see what his operation is and so forth?

A. Yes.

Q. The same as these people did here?

A. Yes.

Q. Did they cause you any trouble when you asked them to leave or your employees asked them to leave the store?

MR. LEWIS: Objection. There was no testimony by this witness concerning people in the store.

THE COURT: Objection is sustained.

MR. STRAWMIRE: Very well.

A. I didn't ask any one to leave the store.

Q. You testified as to one occasion where someone stepped on the porch?

A. That is correct.

Q. These were some ladies that were picketing?

A. That is correct.

Q. Did they cause problems by stepping on the porch?

A. No, but I was asked if they had stepped on the porch. I answered the man's question, they had stepped on the porch.

Q. They didn't cause you any problems?

A. The question wasn't asked that way.

Q. I am asking the question, did they cause you any problems?

A. No problems.

Q. On the 21st you stated there were 13 pickets there, is that correct?

A. That is correct.

Q. It is on that occasion that some of them were walking abreast?

A. That is right, and even during the afternoon, that was when the 13 were there, they had walked more than two abreast, and also in the afternoon while the girls were there, they were walking four abreast many times.

Q. And at that time they were walking, is that correct?

A. Both, they would stand and—

Q. (Interposing) Where were they standing or where were they walking?

A. Right where the cars will drive in for the groceries.

Q. Did they halt or stop the cars from driving in for their groceries?

A. It hindered it, sir.

Q. It hindered it. Did people get in for their groceries and did they get out with their groceries?

A. Yes, but very annoyingly they did.

Q. Annoyingly to who? To the people or to you?

A. To the customers.

Q. You stated that most of the time they were walking about 2 feet from the porch?

A. Yes.

Q. In other words, the bulk of the time they were not on the porch, is that it?

A. They were only on the porch that one occasion as I answered.

Q. And you have a sign posted on the porch, is that it?

A. That is correct.

Q. And the sign says, "No trespassing or solicitation without the consent of the management", is that correct?

A. That is correct.

Q. Does it say "no picketing"?

A. "No trespassing."

Q. Does it say "no picketing"?

A. No, sir, it doesn't.

Q. So that you have been open since what date?

A. December 8th.

Q. And since December 8th you have carried on operations, is that correct?

A. That is correct.

Q. And you have opened and closed every day except Sundays or Holidays, is that correct?

A. Correct.

Q. And people have come to your market and have purchased and left, is that correct?

A. Yes.

MR. STRAWMIRE: I have no other questions at this time.

MR. LEWIS: I have one or two on rebuttal questions.

Redirect Examination

BY MR. LEWIS:

Q. Would you restate the full wording of that Sign that is on the porch as you can recall it?

A. "No trespassing or soliciting on the porch or Weis Parking Lot other than Weis employees without the consent of the Management."

Q. What is the main entrance used by customers of Weis Markets? What entrance do they most frequently use of 1, 2, 3, 4 and 5?

A. I would say 1 and 2.

THE COURT: They are off of Plank Road?

A. Off of Plank Road, yes, sir.

MR. STRAWMIRE: If your Honor please, there is some confusion.

Recross-Examination

BY MR. STRAWMIRE:

Q. Off of Plank Road, is that your answer?

A. For Weis Market customers.

Redirect Examination

BY MR. LEWIS:

Q. 1 and 2 is on what road?

A. I am sorry. I am sorry, your Honor, off of Good's Lane. Good's Lane is 1 and 2. Thank you.

Recross-Examination

BY MR. STRAWMIRE:

Q. Mr. Basehore, which is the most heavily traveled road? I am sure the Court knows but do you know? Plank Road or Good's Lane?

A. Plank Road.

Q. And yet you say that most traffic comes in from Good's Lane?

A. For us, yes.

Q. Well, isn't there traffic comes into you from Plank Road?

A. I would say there is a certain amount naturally. I would be giving a wrong statement if I said differently, but I would say most of the people come up to Good's Lane, make a right, come down and come in the entrance to our store.

Q. You have been there since the store opened, do you know whether any of your customers also shop at Sears?

A. I know they do.

Q. Why sure they do, don't they? They do two things at one time with a visit to the Mall, is that correct?

A. Yes, I would say. There is also people who don't. I imagine there are people come in and just shop Sears and leave, and there is people who come in and Shop Weis's and leave, and there are people who shop both, certainly.

Redirect Examination

BY MR. LEWIS:

Q. I have one other question. Is there any other stores besides Sears and Weis's presently in this location?

A. No.

Recross-Examination

BY MR. STRAWMIRE:

Q. There are other stores contemplated but none presently finished?

A. Correct.

MR. LEWIS: We rest our case, your Honor.

We would like to offer a Stipulation concerning the references to the deed, the documents of record that were referrd to previously, and I think there will be a Stipulation between the parties.

THE COURT: Very well.

MR. WOODCOCK: I represent Logan Valley Plaza, Inc., and Logan Valley Plaza, Inc. and Weis Markets have an agreement which is duly recorded in Deed Book Vol. 831 at page 36, which is incorporated here by reference, there are two.

help resolve a constitutional free speech issue in Nahas v. Local 905, Retail Clerks Ass'n, supra [144 Cal. App. 2d 808, 301 P.2d 932, rehearing denied 144 Cal. App. 2d 820, 302 P.2d 829].

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise . . . ." 114 N.W. 2d 879-880.

(2) *Freeman v. Retail Clerks Union Local No. 1207,* 363 P.2d 803 (Wash. 1961) (concurring opinion), wherein a concurring judge observed:

"Under ordinary circumstances, the owner of property can control who goes on it and for what purpose; however, a formal dedication to public use is not necessary to greatly limit that control. The legislature has imposed limitations upon the owner's right to exclude persons from his premises or to refuse service to them on account of race or creed, if the premises are used as a place of public resort. In other instances, entirely apart from the legislative action, the courts have placed a limitation on the control than an owner might exercise over his property, as in company towns.

"In this case, it is conceded that legal title to the property, over which the pickets carried their signs, was in the appellants—and not in the public. The issue presented was whether the property owners, despite their precautions and efforts to protect their right to control the use of the property, had lost the right to prevent the pickets from carrying their signs. (I take it that the pickets, sans signs, were just like other members of the public, and entitled to be where they were.)

* * *

"If instead of being a shopping center, the property in question was merely a forty-acre pasture for contented cows, but a desirable place from which

pickets could carry signs imparting information (relative to the nonunion status of the employees of J. C. Penney Company) to the customers of that company, there could be no questions that the owner would be entitled to an injunction—not to restrain the picketing, but to prevent their trespass on property where they had no right to be."

If the union activity involved herein did not amount to a trespass, then there arises the question of federal preemption. I shall avoid a lengthy discussion of that subject, but want to emphasize that the federal decisions stress the high degree of freedom allowed union activity on the property of the employer. While those cases are not controlling authority, they do indicate that the case before us is not as open-and-shut as the majority believe. Many of the federal cases are thoughtfully analyzed in Annot., 100 L.Ed. 984 (1956).

There is another basis for my disagreement with the majority. By restricting picketing to the berm areas at the entrances and exits, the majority have lent their sanction to an activity which has overtones of a secondary boycott. Again, I do not intend to discuss at length the unlawful and harmful effects which can occur to neutral employers by such activity but recommend 10 Stanford L. Rev. 694, 702-706, which considers the evils and possible cures of picketing at shopping center entrances.

Had the majority opinion made reference to the foregoing inescapable conflicts, I might not enjoy the result any more than I now do, but at least I would be satisfied that the majority opinion recognized the problems involved.

I dissent.

JUSTICE EAGEN joins in this dissent.

SUPREME COURT, U. S.

AUG 10 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	11
Conclusion	32

Appendix A, Majority and Dissenting Opinions of the Supreme Court of Pennsylvania and Judgment .. 1a

Appendix B, Opinion and Order of Court of Common Pleas of Blair County, Pennsylvania 12a

Appendix C, Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.) 23a

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Chauffeurs Local Union 795 v. Newell, 356 U.S. 341 ... 14
Division 1287, Amalgamated Association v. Missouri, 374 U.S. 74 31
Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716 (C.A. 2) 21
Freeman v. Retail Clerks Union Local No. 1207, 58 Wash. 2d 426, 363 P. 2d 803 12
Garner v. Teamsters, 346 U.S. 485 20
Hague v. C.I.O., 307 U.S. 496 16
Hillsborough Township v. Cromwell, 326 U.S. 620 9

Page

Houston Building & Construction Trades Council (Claude Everett Const. Co.), 136 NLRB 321 26
J. C. Penney Co., 151 NLRB 53 4
Local No. 438 Construction Union v. Curry, 371 U.S. 542 8
Local 761, I.U.E. v. N.L.R.B., 366 U.S. 667 28
Lombard v. United States, 373 U.S. 267 16
Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 9
Marsh v. Alabama, 326 U.S. 501 15
Marshall Field & Co., 98 NLRB 88, enforced as modified 200 F. 2d 375 (C.A. 7) 21
Maryland v. Williams, 44 LRRM 2357 ..... 13, 16
Meatcutters v. Fairlawn Meats, 353 U.S. 20 31
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 ..... 9, 14
Moore Dry Dock Co., 92 NLRB 547 ..... 28, 29
Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W. 2d 876 12
N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105 ..... 22, 23
N.L.R.B. v. Cities Service Oil Co., 122 F. 2d 149 (C.A. 2) 21
N.L.R.B. v. Denver Bldg. Trades Council, 341 U.S. 675 28
N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58 18, 19, 20
N.L.R.B. v. Hearst Publications, 322 U.S. 111 20
N.L.R.B. v. International Rice Milling Co., 341 U.S. 675 28
N.L.R.B. v. Lake Superior Corp., 167 F. 2d 147 (C.A. 6) 21
N.L.R.B. v. Local Union No. 55, 218 F. 2d 226 (C.A. 10) 29
N.L.R.B. v. Service Trade Chauffeurs, 191 F. 2d 65 (C.A. 2) 29
N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226 ..... 21, 23
N.L.R.B. v. United Aircraft Corp., 324 F. 2d 128 (C.A. 2), cert. denied, 376 U.S. 951 21
National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 612 29
Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 25
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 9
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 ... 9
Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 NLRB 856, enforced 249 F. 2d 591 (C.A. 9) 29
Sales Drivers v. N.L.R.B., 229 F. 2d 514 (C.A.D.C.), cert. denied, 351 U.S. 972 29

Page

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 30
Schneider v. Irvington, 308 U.S. 147 18
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rep. 233, 394 P. 2d 921 ..... 12, 18, 22
Seafarers International Union v. N.L.R.B., 265 F. 2d 585 (C.A.D.C.) 29
Sears, Roebuck & Co., 151 NLRB 1356 4
St. Louis, Iron Mountain & So. Ry. Co. v. Southern Express Co., 108 U.S. 24 9
Steelworkers v. N.L.R.B., 376 U.S. 492 19
System Federation v. Wright, 364 U.S. 642 9
Thornhill v. Alabama, 310 U.S. 88 ..... 13, 17, 23
Weis Markets, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708 4
Youngdahl v. Rainfair, 355 U.S. 131 ..... 20, 30

STATUTES:

28 U.S.C. § 1257 2

National Labor Relations Act (61 Stat. 316, 29 U.S.C. § 141, *et seq.*) 3

MISCELLANEOUS:

Gould, Union Activity on Company Property, 18 Vand. L. Review 73, 119-135 (1964) 13
Kaylin, A Profile of the Shopping Center Industry, Chain Store Age, May 1966 32
Keller, Publicity Picketing & Shopping Centers, Ill., Labor Law Developments 1967, 13th Ann. Inst. Labor Law, Southwestern Legal Found. (1967) ..13, 32
Notes, 73 Harv. L. Rev. 1216 (1960); 1960 Duke L. J. 310; 48 Va. L. Rev. 133 (1962); 1962 U. Ill. L. Rev. 475; 3 Bost. Col. Ind. Com. L. Rev. 289 (1962); 49 Va. L. Rev. 1571 (1963); 5 Bost. Col. Ind. Com. Law Rev. 768 (1964) 13
Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967) 13
Shopping Centers and Labor Relations Law, 10 Stan. L. Rev. 694 (1958) 13, 31
Wall Street Journal, June 13, 1967, p. 1, Col. 5 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners*,

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Amalgamated Food Employees Union Local 590, AFL-CIO, and others [1] pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on March 21, 1967.

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[1] Also named in the complaint as defendants, and additional petitioners here, are "John Doe and Richard Roe, said names being fictitious, true names unknown, said persons being officers, employees, agents, servants and pickets employed by defendant Union, and any other individuals, labor unions or labor organizations acting in concert" (R. 1).

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, three Justices dissenting, is reported at 227 A.2d 874 (*infra,* p. 1a). The opinion of the Court of Common Pleas of Blair County, Pennsylvania, is unreported (R. 87-99, *infra,* p. 12a).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 21, 1967 (*infra,* p. 6a). An order was entered on June 6, 1967 by Mr. Justice William J. Brennan, Jr., extending the time for filing a petition for a writ of certiorari to August 18, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra,* p. 9, n. 5.

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing at the premises of a store located within a shopping center informing the public that the store "is Non-Union, these employees are not receiving union wages or other union benefits." The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to adjudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the fed-

eral right to engage in "concerted activities for . . . mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in Appendix C (*infra*, pp. 23a-26a).

STATEMENT

Logan Valley Mall is a shopping center (R. 87, *infra*, pp. 1a, 12a). Owned by Logan Valley Plaza, Inc. (Logan), it is a newly-developed and sizeable commercial complex (R. 87, 86 *infra*, p. 12a). Its perimeter spans about 5,740 feet or 1.1 miles (R. 86). It is situated in Logan Township, near the City of Altoona, Pennsylvania, at the intersection of two public highways known as Plank Road (U.S. Route 220) to the east and Good's Lane to the south (R. 87, *infra*, pp. 1a, 12a). Plank Road is a heavily traveled highway, with cars moving at very good speed (R. 45, 50). Of the five entrances to the shopping center, three are located on Plank Road and two on Good's Lane (R. 86, 59-60, 49-50). The shopping center is separated from the highways by earthen berms, unbroken except for the five paved entrances providing ingress and egress between the highways and the center (R. 88, *infra*, p. 12a). At entrances 1 and 2, the berm is 15 feet in width from the highway to the edge of the ditch; at entrances 3, 4, and 5, 12 feet in width; and the paved entrances are 20 feet in width (R. 35-37).

At the time of the events in this case, the shopping center was occupied by Weis Markets, Inc. (Weis) and Sears, Roebuck and Co. (Sears) (R. 88, *infra*,

p. 12a). Other occupants were of course expected (R. 88, 51, 59, 73, *infra,* pp. 1a, 4a, 13a).[2] Sears operates a department store and an automobile service station (R. 88, *infra,* p. 12a). Weis operates a supermarket engaged in selling food and sundry household articles (R. 88 *infra,* pp. 1a; 13a). The business operations of Weis and other occupants of the shopping center affect interstate commerce and their labor relations are therefore governed by the National Labor Relations Act.[3]

The Weis property consists of an enclosed modern market building with an open but covered porch running north and south along its front and a pick-up zone

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[2] We are informed that at present, in addition to Weis and Sears, the shopping center is occupied by the following 15 enterprises: Penney's, First National Bank, Ormond's Girl Shop, Murphy's 5 & 10, Mall Barber Shop, Thrift Drugs, Miller's Auto Supply, Kinney's Shoe Store, Father N Son Shoe Store, Seni's Hair Fashions, De Roy's Jeweler, Singer Sewing, Lester's Dress Shop, Schiff's Shoes, and Book and Record Shop.

[3] The NLRB has often exercised jurisdiction over Weis. *Weis Markets,* 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708. Weis is "engaged in the sale of food and sundry household articles, employing approximately two thousand two hundred persons in its business, and having its principal place of business at . . . Sunbury, Pennsylvania" (R. 6). Its store at the shopping center, No. 40 (R. 20), is one of twenty-nine in its Northern Division (R. 38, 28). In the overall Weis "operates 52 retail food markets (12 in shopping centers) in 36 communities in central Pa. within a 125-mile radius of Sunbury. All stores sell groceries, meats, bakery products, produce, dairy products, frozen foods and health and beauty aids, tobacco and certain other nonfood items"; its net sales in 1965 were $111,024,294 and its net income $4,659,103; it has 3,055,000 shares of common stock listed on the New York Stock Exchange. Standard & Poor's, Corporation Records, T-Z, p. 2751 (1966). Sears is of course a national enterprise over which the NLRB regularly exercises jurisdiction (*e.g., Sears, Roebuck & Co.,* 151 NLRB 1356), as is J. C. Penney Co., identified as an occupant of the shopping center on the latter's plan (R. 86, 79; *e.g., J. C. Penney Co.,* 151 NLRB 53).

directly along the porch for loading purchased goods into customer's cars (R. 88, *infra*, pp. 1a, 13a). The pick-up zone, 4-5 feet in width and 30-40 feet in length, is marked off with yellow lines (R. 55, *infra*, p. 1a, n. 2); it can accommodate three, possibly four, cars (R. 55). Between the supermarket area and the highway berms are extensive parking lots to the east and south of Weis; these macadam lots have parking spaces and driveways distinctly lined off on the ground; these areas constitute a common parking lot for Weis and Sears customers, and eventually for other stores in the center as they open (R. 88, *infra*, pp. 1a, 13a). There are also pedestrian ways (R. 86). The distance across the parking lots from the highway entrances to the Weis property is 350 feet at entrances 1 and 2, further from entrance 4, and 450-500 feet at entrance 5 (R. 34-35). Entrance 5 is the main entrance to the shopping center, and the most heavily used (R. 39, 60). Except for entrance 3, used primarily for access to the Sears automobile service station (R. 63-64, 40), all entrances are used by customers shopping at both Weis and Sears, and eventually other stores (R. 39-41, 50, 63-64).

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees (R. 89, *infra*, p. 13a). Beginning on December 17, 1965, small groups of men and women picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits. Amalgamated Food Employees Union Local 590" (R. 89, 29, *infra*, pp. 13a, 2a, n. 3). They walked back and forth in front of the Weis supermarket, primarily at the pick-up zone adjacent to the covered porch (R. 89, *infra*, p.

13a). The average number of pickets was variously estimated at 5, 6, or 7 (R. 39, 61-62). All were members of petitioner Union (R. 66). They were employed by A & P, Quaker, and Acme, neighboring stores, and volunteered to picket at Weis on their own time (R. 66-68, 73-74, *infra,* p. 2a, n. 3). They were not and never had been employees of Weis (R. 92, *infra,* pp. 6a, 13a). The picketing was peaceful and unaccompanied by either oral threats or actual violence (R. 90, *infra,* pp. 1a, 2a, 14a).

A few days after it opened for business on December 8, Weis posted a sign between its entrance and exit doors reading, "No trespassing or soliciting is allowed on Weis Market porch or parking lot by any one except Weis employees without the consent of the management" (R. 33-34, *infra,* p. 5a). On December 20, Weis' Assistant General Superintendent approached the individual he thought was in charge of the arriving pickets (R. 32). After ascertaining that they intended to picket, the superintendent stated, "Do you know you are picketing on private property? . . . [T]his property belongs to Weis Markets. . . . [The Weis property ends] Out along the highway right at the edge of the macadam. . . . If you want to picket do your picketing out there" (R. 33).

On December 27, 1965, at the instance of Weis and Logan, the Court of Commons Pleas of Blair County issued an *ex parte* injunction prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms (R. 6-21, 98, *infra,* pp. 14a, 2a, n. 4). The order enjoined the Union and its members *inter alia* from (R. 20):

> (a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store

No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area.

(b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exits leading to said parking area.

After the *ex parte* injunction issued, picketing was conducted on the highway berms at the entrances to the shopping center, two pickets at entrance 5, two at entrance 4, and one or two at entrances 1 and 2 (R. 62). Entrance 3 primarily served the Sears automobile service station, and when that fact was ascertained, picketing at that entrance was discontinued (R. 64). When picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59). The handbills read: "We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market". . . . "Please Patronize Union Markets! A & P—Quaker—Acme". . . . "We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets" (R. 89, *infra*, pp. 13a-14a, 2a, n. 3).

On January 4, 1966, the Union moved to dissolve the *ex parte* injunction (R. 22-26). It urged that (1) "the activity here complained of amounts to nothing more than peaceful, informational picketing by Union Members for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc., at said store . . ." (R. 22-23); (2) "the area whereon the defendant was conducting a peaceful and lawful picketing in a shopping

center, pedestrian and parking area and as such, constitutes quasi-public property even though privately owned" (R. 24); (3) "picketing [at the highway entrances] indirectly affects other tenants of the Logan Valley Plaza, Inc. Shopping Center which in no way is desired by the defendant" (R. 25); and (4) "by reason of the Labor Management Relations Act, 29 USCA §§ 141 et seq., your Honorable Court is without jurisdiction in this labor dispute whatsoever . . ." (R. 26).

After an evidentiary hearing the Court of Common Pleas ruled against the Union (R. 87-100, *infra*, p. 12a). It held that the picketing "constitutes a trespass on the Mall premises and is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99, *infra*, p. 21a).[4] It decided that the pickets were not within the class to whom the shopping center had been opened; "Such a commercial premises may properly be classified as quasi-public only for the use of lessees, employees and business invitees, and those not falling within either group are not upon the premises for the purposes for which the enterprise was constructed and intended" (R. 95-96, *infra*, pp. 18a-19a). It therefore rejected the Union's argument that "a shopping center constitutes quasi-public property and, therefore, picketing on the Mall premises is not a trespass, but merely a lawful exercise of the constitutional right of free speech" (R. 91, *infra*, p. 15a). It did not address itself to the Union's claim that paramount federal law "has removed this type of labor

[4] Based on the finding that the picketing was in part designed to coerce union membership, the conduct is clearly within the area preempted by the NLRB. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542. However, in affirming the *nisi prius* judgment, the Pennsylvania Supreme Court disclaimed reliance on this finding (*infra*, p. 6a).

dispute from the sphere of state action and thereby precludes your Honorable Court from entering any decree whatsoever in this matter" (R. 26). Accordingly, the Court of Common Pleas entered an order "making permanent the injunction as previously decreed" (R. 98, *infra*, p. 20a).[5]

On appeal, three Justices dissenting, the Supreme Court of Pennsylvania affirmed the *nisi prius* decree

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[5] The decree entered by the Court of Common Pleas continued the injunction in effect "until further adjudication of this case or until further order of this Court. . . ." (R. 100a). This explicit retention of jurisdiction to vacate or modify an injunction operating *in futuro* is familiar equity procedure (*System Federation* v. *Wright*, 364 U.S. 642; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 298; *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 103), and does not detract from the finality of the decree (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307, n. 4; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24; *cf., Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70, n. 3). Furthermore, treating the *nisi prius* decree as a preliminary injunction, the judgment is nevertheless final. First, requisite finality exists because the judgment constitutes "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board . . . ." *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 552, 543-550. Second, apart from preemption, there is in any event "nothing more of substance to be decided in the trial court," and the judgment is therefore final for this independent reason. *Id.* at 550-551. The federal questions "have reached a definitive stop" (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided'" (*Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382). Lastly, well-founded acquisition of jurisdiction on any ground empowers a court to decide the entirety of the controversy. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629. Upon any hypothesis, therefore, the judgment below is final within the meaning of 28 U.S.C. § 1257, and this Court has jurisdiction to decide the federal questions presented.

(*infra,* pp. 1a-6a). The court began with the premise that the picketing was "concededly peaceful in nature" (*infra,* p. 1a). Its companion premise was that "the Commonwealth has not only the power but the duty to preserve the property of its citizens from invasion by way of trespass . . ." (*infra,* p. 4a). It therefore turned the validity of the peaceful picketing upon the question whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property" (*infra,* p. 4a). It answered that question by its determination that the shopping center had been opened "only to those members of the public who would . . . possibly contribute to the financial success of the venture" (*infra,* p. 5a); the "invitation to the public . . . was limited to those who might benefit Weis' and Logans' enterprises, including potential customers as well as the employees of the shopping center concerns" (*infra,* p. 5a). Since the pickets "certainly were not within the orbit of the class of persons entitled to the use of the property" (*infra,* p. 5a), the picketing, "even though . . . of a peaceful nature, . . . constituted trespass which very properly was restrained" (*infra,* p. 6a). The court fortified this conclusion with its observation that "the pickets were not and never had been employees of Weis" (*infra,* p. 6a). Based on its determination that the picketing was enjoinable as trespass, the court below deemed "it unnecessary to determine whether the instant picketing was for an unlawful purpose" (*infra,* p. 6a), thereby disclaiming the companion ground invoked by the Court of Common Pleas that the picketing was "designed, at least in part, to pressure Weis . . . to compel its employees to join a union" (*supra,* p. 8). The Pennsylvania Supreme Court did not address itself to the question of federal preemption.

Three Justices dissented (*infra*, p. 6a), Mr. Justice Cohen writing a dissenting opinion (*infra*, pp. 7a-11a). Citing this Court's opinion in *A.F.L.* v. *Swing*, 312 U.S. 321, the dissent observed that "'stranger picketing' is . . . constitutionally protected" (*infra*, p. 7a). Citing this Court's opinion in *Marsh* v. *Alabama*, 326 U.S. 501, the dissent reasoned by analogy that, as the shopping center "was open to the public in general and, though privately opened, served a public function, private management could not curtail precious constitutional liberties" (*infra*, pp. 7a-8a). Trespass aside, the dissent continued, "there arises the question of federal preemption" (*infra*, p. 11a). The dissent emphasized that "federal decisions stress the high degree of freedom allowed union activity on the property of the employer" (*infra*, p. 11a). Furthermore, apart from the protected character of peaceful picketing, "restricting picketing to the berm areas at the entrances and exits . . . has overtones of a secondary boycott", for it risks "unlawful and harmful effects . . . to neutral employers . . ." (*infra*, p. 11a). The dissent regretted the failure of the majority opinion to face the "inescapable conflicts" with paramount federal law (*ibid.*).

REASONS FOR GRANTING THE WRIT

Whether peaceful picketing within a shopping center can be prohibited as a trespass is an important and recurrent federal constitutional and statutory question which has provoked a diversity of judicial opinion and should be determined by this Court.

I

Judicial opinion is divided. In conflict with the decision below, the California Supreme Court holds

that peaceful picketing within a shopping center is protected as free speech,[6] and the Washington Supreme Court holds that the conduct is within the domain preempted by the National Labor Relations Board.[7] The Wisconsin Supreme Court rules that, where "the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing."[8] By an equal 4-4 division the Michigan Supreme Court affirmed an order enjoining a shopping center owner from interfering with handbilling within the center;[9] one branch of the court takes the view that a shopping center "is simply a modern public marketplace", no different from "the historic public markets of earlier days", and that the "public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder",[10] while the other branch of the court takes the view that handbilling to dissuade the consumer from buying nonunion-made clothing "is obviously not consistent with inherent

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[6] *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rep. 233, 394 P.2d 921, cert. denied, 380 U.S. 906.

[7] *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P.2d 803.

[8] *Moreland Corp.* v. *Retail Store Employees Union Local No. 444*, 16 Wis. 2d 499, 114 N.W. 2d 876, 879.

[9] *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 547, 122 N.W. 2d 785.

[10] 122 N.W. 2d at 796-797.

property rights. . . ." [11] A lower Maryland court in an excellent analysis bars state interference with peaceful picketing within a shopping center both because the conduct is constitutionally protected as free speech and because it is federally preempted.[12] The question has excited wide commentary ranging the spectrum.[13] Its dimensions have been fully exposed and the issue is ripe for determination by this Court.

II

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra*, p. 5). Communication of this message by picketing is "the dissemination of information concerning the facts of a labor dispute [which] must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *Ala-*

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[11] 122 N.W. 2d at 793.

[12] *Maryland* v. *Williams*, 44 LRRM 2357 (Md. Crim. Ct., June 10, 1959).

[13] Note, *Shopping Centers and Labor Relations Law*, 10 Stan. L. Rev. 694 (1958); Gould, *Union Activity on Company Property*, 18 Vand. L. Rev. 73, 119-135 (1964); *Keller, Publicity Picketing and Shopping Centers*, 111, Labor Law Developments 1967, 13th Ann. Inst. Lab. Law, Southwestern Legal Found. (1967); Notes, 73 Harv. L. Rev. 1216 (1960); 1960 Duke L. J. 310; 48 Va. L. Rev. 133 (1962); 1962 U. Ill. L. Rev. 475; 3 Bost. Col. Ind. Com. L. Rev. 289 (1962); 49 Va. L. Rev. 1571 (1963); 5 Bost. Col. Ind. Com. L. Rev. 768 (1964). See also, Note, *Regulation of Demonstrations*, 80 Harv. L. Rev. 1773, 1779-81 (1967).

bama, 310 U.S. 88, 102.[14] "Peaceful picketing is the workingman's means of communication" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293); it is therefore "in part an exercise of the right of free speech guaranteed by the Federal Constitution" (*Building Service Union* v. *Gazzam,* 339 U.S. 532, 536-537).

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (*infra,* p. 6a). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. A shopping center is a multi-store complex on a large tract of land with access from public ways to a parking area for motor traffic and to sidewalks fronting on the stores for walking. It is open to the customer and the window shopper, to the employees working within the stores and to the employees delivering to the stores, to applicants for employment seeking work and to salesmen seeking to sell their wares to the stores, to the garbage collector and the postman, and to all of the rest of the community that makes the center function. A motorist needs no pass to drive into the center and a pedestrian no leave to walk its streets. The shopping center is a market place whose very being inheres in its openness to the public.

But the court below holds that, unlike the other members of the public, the picket with a labor message

[14] See also, *Chauffeurs Local Union 795* v. *Newell,* 356 U.S. 341.

has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a sheltered enclave insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned. A store facing a street owned by the township must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Only a store facing a street owned by a private holder is given immunity from peaceful picketing conveying the identical message. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks.

A shopping center open to that part of the public which benefits it economically cannot be closed to that part of the public seeking to disseminate an adverse message flowing from the disfavored manner in which a business inside the center operates. The shopping center takes the community in its entirety or not at all. Entry into a "business block" used as a "regular shopping center" in "a company-owned town", this Court held, could not be shut to the distribution of religious literature on the ground that "the title to the property belongs to a private corporation." *Marsh* v. *Alabama*, 326 U.S. 501, 502-503. "We do not agree," this Court explained, "that the corporation's property interests settle the question. . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of

those who use it." *Id.* at 505-506. A facility open to the public, "though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence." Mr. Justice Douglas concurring in *Lombard* v. *United States,* 373 U.S. 267, 275. "Fundamentally, the property involved is not 'private' any more. That is why the competing interest of freedom of speech must be served." *Maryland* v. *Williams,* 44 LRRM 2357, 2362 (Md. Crim. Ct. June 10, 1959). When the consumer is invited to buy and the employee hired to work inside the shopping center, the state cannot by injunction bar the worker from informing them by peaceful picketing within the center in front of the store that the place is "Non-Union" and that "these employees are not receiving union wages or other union benefits."

Land ownership by a private holder is as irrelevant as land ownership by a governmental entity when the question is the exercise of free speech on property opened to public entry. This Court has rejected the view that a municipality is empowered blanketly to suppress the expression of First Amendment rights on public grounds because "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof. . . ." *Hague* v. *C.I.O.,* 307 U.S. 496, 514. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* at 515. When the issue is freedom of speech on grounds otherwise open to the public, it can

make no difference whether title to the property is in a municipality or a private holder. Property interest *per se* is in either case equally insubstantial as a basis for a state court injunction prohibiting the expression of First Amendment rights.

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (*infra*, p. 6a). This hoary ground is in square conflict with this Court's decision in *American Federation of Labor* v. *Swing*, 312 U.S. 321. This Court answered yes to the question whether "the constitutional guaranty of freedom of discussion [is] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute" (*id.* at 323). "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's Case*." *Id.* at 326. Paramount federal labor policy is built on the premise that labor activity is not rightfully confined to disputants standing in

the proximate relation of employer and employee (*infra,* pp. 24-25).

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. It does not justify denial of communication at that place because picketing can be conducted "at other, admittedly less advantageous, locations off plaintiff's premises." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 923, cert. denied, 380 U.S. 906. ". . .. [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 147, 163. "First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Mr. Justice Black concurring in *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 80. Furthermore, picketing at distant places, with the concomitant difficulty of confining the message and the response to the store at which it is directed, risks enveloping others to their detriment in a controversy in which they are unconcerned (*infra,* p. 27).

The nub of the matter was laid bare by the California Supreme Court in upholding the right of peaceful picketing inside a shopping center at the premises of the disfavored store. *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31, supra.* "The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing

at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." 394 P. 2d at 926. The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property.

III

1. Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the National Labor Relations Board. Section 7 of the Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, 498-499. Similarly, in regulating organizational and recognition picketing, Con-

gress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters,* 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution " 'belongs to the usual administrative routine' of the Board." [15] In a variety of contexts private property has been required to yield

[15] *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 130.

to the statutory guaranty of protected concert.[16] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[17]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use" (98 NLRB at 93). The Court of Appeals for the

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[16] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2).

[17] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951.

Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the shopping center situation to the standard expressed by this Court in *N. L. R. B.* v. *Babcock & Wilcox,* 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike a shopping center, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the shopping center is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "'theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result.[18]

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry into the shopping center of every element of the public except that part of the community with a labor message directed at and adverse to a store within the center is invidious. The court below justifies this discriminatory debarment on the explicit ground that the invitation to enter extends "only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture." (*infra*, p. 5a). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from

[18] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[19]

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing simply because the picketing is conducted on the private but open property of a shopping center. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing inside a shopping center is no exception.

2. The secondary reason by which the court below justifies the prohibition of peaceful picketing—that "the pickets were not and never have been employees of Weis" (*infra*, p. 6a)—likewise conflicts fundamentally with the federal scheme. Section 2(3) of the National Labor Relations Act states that the term "employee" "shall not be limited to the employees of a particular employer," and section 2(9) of the Act defines a "labor dispute" to mean any labor-affected controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." "The broad definition of 'employee' . . . as well as the definition of 'labor dispute' . . .

[19] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. " 'It is not every interference with property rights that is within the Fifth Amendment . . . .' " *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8 In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.' " *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U.S. 177, 192. The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the Act, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead how and when it may be conducted. The picketing in this case informed the public that the disfavored store was "Non-Union" and "these employees are not receiving union wages or other union benefits" (*supra*, p. 5). This picketing is arguably either within or outside the scope of section 8(b)(7)(C). It might be construed as picketing to cause acceptance or selection of the picketing union by the store employees as their representative. In that event the picketing becomes an unfair labor practice where it has been conducted without a representation petition "being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ." If a timely petition is filed an expedited election is conducted to determine whether or not the union is the employees' majority choice as their representative. But picketing will not be prohibited despite the failure to file a representation petition, and an expedited election will not be con-

ducted even if a petition is timely filed, if the picketing falls within the scope of the final proviso to (C):

> Nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by another person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Furthermore, the picketing would not be within the scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining the prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.[20]

It is thus apparent that to say that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act. "Peaceful stranger picketing by a labor organization in the course of a labor dispute is therefore an activity subject to injunction only through the procedures authorized in the Act, and, if not so condemned, is protected by Congress against injunctive prohibition arising outside the Act." *Aetna Freight*

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[20] *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321.

Lines v. *Clayton,* 228 F. 2d 385, 388 (C.A. 2), cert. denied, 351 U.S. 950.

3. The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (*infra,* p. 2a, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The court below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

Congress sought to reconcile "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies

not their own." *N. L. R. B.* v. *Denver Bldg. Trades Council,* 341 U.S. 675, 692. One preeminent means by which that end is achieved is to picket the primary employer at his immediate premises which he solely occupies and at which he conducts his regular business. *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667; *Steelworkers* v. *N. L. R. B.,* 376 U.S. 492, 498-500. The court below destroys the confinement of picketing to the "geographically restricted area near" the primary employer's premises "in a manner traditional in labor disputes"[21] by precluding picketing at that place and removing it instead to the distant highway entrances serving others as well as the primary employer. It therefore forces the creation of a common situs and compels recourse to the standards which prevail where the primary and neutral employers occupy the same premises and where the picketing at the shared premises is primary only "if it meets the following conditions" (*Moore Dry Dock Co.,* 92 NLRB 547, 549; *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667, 676-677):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Comparatively nice refinements of time, place, and circumstances determine adherence to or departure from the standards for picketing at a common situs.

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[21] *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665, 671.

On the one hand, picketing at the access to a shopping center housing many establishments obviously opens the union to the risk of a finding that "the union did not attempt to minimize the effect of its picketing, as required in a common situs case, on the operations of the neutral employers utilizing the market." *Local 761, I. U. E.* v. *N. L. R. B.*, 366 U.S. 667, 678-679; *Retail Fruit & Vegetable Clerks (Crystal Palace Market)*, 116 NLRB 856, enforced, 249 F. 2d 591 (C.A. 9). On the other hand, if the picketing at the common situs is otherwise primary, it is of no moment that neutral employers may suffer because the picketing, though properly circumscribed, may nevertheless envelop their operations.[22] For, "however severe the impact of primary activity on neutral employers, it . . . [is] not thereby transformed into activity with a secondary objective." *National Woodwork Manufacturers Assn.* v. *N. L. R. B.*, 386 U.S. 612, 627.

The upshot is that the court below removes the picketing from its natural primary habitat, subjects the union to the resultant risk that its picketing at shared entrances will be found to be secondary because not sufficiently circumscribed, and needlessly embroils neutral employers by exposing them to picketing in a controversy not their own. The decision below is therefore faithless to the congressional reconciliation of protected primary picketing and prohibited secondary pressure.

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[22] *Local 761, I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 673-674; *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2); *Sales Drivers* v. *N.L.R.B.*, 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972; *N.L.R.B.* v. *Local Union No. 55*, 218 F. 2d 226, 230 (C.A. 10); *Seafarers International Union* v. *N.L.R.B.*, 265 F. 2d 585, 590, 591 (C.A.D.C.).

4. The elements of the controversy thus place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

IV

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with federally protected rights and therefore cannot stand. Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "Non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own. Accordingly, in prohibiting peaceful picketing safeguarded by the National Labor

Relations Act, Pennsylvania by the common law formulated and enforced by its judiciary "has forbidden the exercise of rights explicitly protected by § 7 of that Act"; "a state law which denies that right cannot stand under the Supremacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri,* 374 U.S. 74, 83.

V

This Court has expressly refrained from passing upon the question whether peaceful picketing at "stores, located in suburban shopping centers," can be enjoined as " 'trespassing upon . . . property' " because "the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores." *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, 24-25. It is time to face the question. "The suburban movement in America has been accompanied by a revival of the all-purpose market, recast in the form of the shopping center, a planned arrangement of individual retail units on a single large tract."[23] "By the end of 1966, there will be between 10,000 and 11,000 shopping centers in the United States and Canada, and these shopping centers will account for almost $79 billion in annual sales —or approximately 37 percent of the total retail sales in the United States and Canada. From 1964 through 1966 shopping centers enjoyed an annual increase of more than 2 percent per year in the share of total retail sales. If that growth rate continues through 1970, shopping centers will then account for more than 45 percent of the total retail sales. By the end

[23] Note, *Shopping Centers and Labor Relations Law,* 10 Stan. L. Rev. 694 (1958).

of 1966, more than $25 billion will have been invested in the United States and Canada. An obscure but perhaps interesting figure is that these shopping centers at the end of this year will provide almost 12 million parking spaces for cars."[24] The importance of peaceful picketing at the scene of the dispute within the shopping center is self-evident. The present unsettled state of the law is a serious and vexing impediment to the exercise of that right.[25] Determination of the ground rules by this Court is essential.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1967.

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[24] *Keller, Publicity Picketing and Shopping Centers,* 111, 112, *Labor Law Developments 1967,* 13th Ann. Inst. Labor Law, Southwestern Legal Found. (1967). The source of these statistics is Kaylin, *A Profile of the Shopping Center Industry,* Chain Store Age, May 1966.

[25] "Suburbs pose new organizing problems as unions expand drives. Just entering suburban shopping centers, where the owner controls accesses and parking lots, can be tough for organizers of the Retail Clerks Union and the Hotel and Restaurant Employees Union. The clerks have won several 'trespass cases' in state courts, but, says a spokesman, it's tough 'hedgerow fighting.'" Wall Street *Journal,* June 13, 1967, p. 1, col. 5.

APPENDIX

APPENDIX A

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT OF PENNSYLVANIA AND JUDGMENT

Majority Opinion

Filed: March 21, 1967

JONES, J.

This appeal challenges the grant of injunctive relief the effect of which was to restrain certain picketing concededly peaceful in nature.

Logan Valley Plaza, Inc. [Logan], owns a newly-developed and large shopping center, known as the Logan Valley Mall, located at the intersection of two public highways in Logan Township near the City of Altoona, Blair County. At the time of the events related, at this shopping center only two stores were occupied, one by Weiss Markets, Inc. [Weis], a concern engaged in the sale of food and sundry household articles, and the other occupied by Sears department store and automobile service station.[1] The Weis property consists of the store proper, a porch and, directly in front of the porch, a parcel pick-up zone for the loading of purchased goods into customers' cars.[2] Directly in front of the Weis property is a very large p[illegible]ng lot extending toward two public highways from [illegible] highways there are entrances and exits to and fr[illegible] the parking lot. The parking area is owned by Logan and provided for the use of Weis, Sears and any future occupants of store properties in the shopping center. Separating this parking area from the several public highways is a fifteen foot berm.

Weis—whose employees are not union members and were not picketing—opened for business on December 8, 1965.

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[1] Sears is not a party to this litigation.

[2] This area—approximately 4-5 feet in width and 30-40 feet in length—is marked off with yellow lines and is directly in front of the porch.

and, eleven days thereafter, four pickets, members of Amalgamated Food Employees Union, Local 590, AFL-CIO, [Union], appeared.[3] The pickets—ranging in number from 4 to 13—walked back and forth in front of the Weis store, occasionally on the porch of the store but usually in the parcel pick-up zone, on the parking lot and on the berms near the property entrances and exits. The court below found, and it is established by the evidence, that the picketing was peaceful in nature.

Ten days after the picketing began, Weis and Logan instituted an equity action in the Court of Common Pleas of Blair County and that court, *ex parte,* issued a preliminary injunction against the Union. That injunction restrained the Union from: (1) picketing and trespassing on Weis' property, i.e., the store proper, the porch and the parcel pick-up area; (2) picketing and trespassing upon Logan's property, i.e., the parking area and entrances and exits thereto; (3) physically interfering with Weis' business invitees entering or leaving the store or parking area; (4) violence toward Weis' business invitees; (5) interference with Weis' employees in the performance of their duties.[4] Four days thereafter, a hearing was held

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[3] The pickets—employees of nearby Atlantic & Pacific stores which are competitors of Weis—carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other benefits" and they passed out handbills which stated—"We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market" . . . . "Please Patronize Union Markets! A & P—QUAKER—ACME." . . . . We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets."

[4] The practical effect was to restrict picketing to the berm areas near the entrances and exits, picketing which could be carried on without danger from traffic on the public highways. The court did attempt, apparently, to limit the number of pickets but the record does not reveal how many pickets were allowed.

on a motion to continue the injunction and, after hearing, the court entered a decree continuing the preliminary injunction. From that decree the instant appeal was taken.

The rationale of the decision in the court below was twofold: (a) that the picketing was upon private property and, therefore, unlawful in manner because it constituted a trespass; (b) that the aim of the picketing was to compel Weis to require its employees to become members of the Union and, therefore, the picketing, albeit peaceful, was for an unlawful purpose.

Our scope of review is well settled. In *Philadelphia Minit-Man Car Wash Corp. v. Building and Construction Trades Council of Phila. & Vicinity,* 411 Pa. 585, 588, 589, 192 A. 2d 378 (1963), we said: "The validity of the preliminary injunction is determined by the well-established rule repeated in Mead Johnson & Co. v. Martin Wholesale Distributors, Inc., 408 Pa. 12, 19, 182 A. 2d 741, 745 (1962): 'Our uniform rule is that, on an appeal from a decree which refuses, [or] grants . . . a preliminary injunction, we will look only to see if there were any apparently reasonable grounds for the action of the court below, and we will not further consider the merits of the case or pass upon the reasons for or against such action, unless it is plain that no such grounds existed or that the rules of law relied on are palpably wrong or clearly inapplicable: (citing authorities).' "

The Union contends that the court below erred in ruling that the picketing constituted a trespass upon private property of Weis and Logan and urges that the parcel pick-up area and the parking lot were not private, but quasi-public, property.[5]

[5] We do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass. Our reading of the record indicates that the picketing that did take place on the porch was sporadic at most and that the Union itself discouraged such picketing.

That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: *Thornhill v. Alabama,* 310 U.S. 88, 105, 60 S. Ct. 736 (1940); *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union,* 413 Pa. 420, 431, 197 A. 2d 614 (1964); *Wortex Mills, Inc. v. Textile Workers Union of America, CIO,* 369 Pa. 359, 363, 364, 85 A. 2d 851 (1952). Our immediate inquiry is whether, in the factual matrix of the case at bar, the conduct of these pickets constituted an invasion of the private property of Weis and/or Logan. Do the parcel pick-up zone and the parking areas constitute private or quasi-public property?

Our research does not disclose that we have ever determined whether the property in a shopping center, accessory to its main purposes, constituted private or quasi-public property. Resolution of that question involves the consideration of many factors. There is no doubt that this shopping center was not conveyed, donated or otherwise dedicated to the public use generally; neither the record nor common sense would justify such a finding. Both Weis and Logan, the former in opening its store and the latter in creating its shopping center as an area upon which commercial enterprises would be conducted, fully anticipated that that portion of the public interested in patronage of Weis' store and the other commercial enterprises, opened and expected to be opened, would not only enter the stores but would utilize fully the parking and the parcel pick-up facilities of the center. The provision of such facilities furnishes attractive features in the complex of the shopping center to attract potential shoppers. The success of both Weis' store and the Logan shopping center depends upon the extent to which both are able to induce and persuade the public to visit and shop in the area. Both Weis and Logan, by their provision of the parking and pick-up facilities impliedly invited the

public to utilize such facilities. However, that invitation to the public was not without restriction and limitation; it was not an invitation to the general public to utilize the area for whatever purpose it deemed advisable but only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture.

The invitation to the public, extended by the operation of the parking area and parcel pick-up area, was limited to such of the public who might benefit Weis' and Logan's enterprises, including potential customers as well as the employees of the shopping center concerns. That the invitation to the public was general, as the Union implicitly urges, offends the common sense of the matter.

Moreover, in the case at bar, that Weis had taken special precautions against an indiscriminate use of its property is evident from this record. It had posted a sign on its property which stated "'No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management''. A general invitation to certain classes of persons to use the premises and the exclusion of certain other classes of persons from such use is fully consistent with the right of a property owner to the use and enjoyment of his property. See: *Adderley v. State of Florida,* —— U.S. ——, ——, 87 S. Ct. 242, 247 (1966). Those who were picketing Weis' and Logan's property certainly were not within the orbit of the class of persons entitled to the use of the property.

Great reliance is placed by the Union on *Great Leopard Market Corporation Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America,* 413 Pa. 143, 196 A. 2d 657 (1964). In *Great Leopard,* seven employees of Great Leopard went on strike and the picketing was conducted by blocking the sole driveway entrance to the

supermarket and a foot-bridge which connected a municipal parking lot and the supermarket property. We were of the opinion that the terms of the injunction were too broad and modified the injunction to permit picketing in the front and the rear of the supermarket. In *Great Leopard,* we did not determine either the status of the supermarket property nor whether the employees were trespassers. Moreover, it is to be noted that the pickets were employees of the supermarket whereas in the case at bar the pickets were not and never had been employees of Weis. In our view, *Great Leopard* is not controlling of the instant appeal.

While both Weis and Logan granted to a segment of the public certain rights in connection with the use of their property, such cession of rights did not constitute a grant of all their rights to all the public. To hold that these property owners solicited the use of their property by persons who were attempting to discourage the public from patronizing the store facilities lacks any basis in law or common sense. These pickets, even though engaged in picketing of a peaceful nature, had no right or authority whatsoever to utilize the private property of Weis and/or Logan for such picketing purposes; such use constituted a trespass which very properly was restrained.

The court below had reasonable grounds upon which to grant injunctive relief in the factual situation presented upon this record.

In view of the conclusion reached, we deem it unnecessary to determine whether the instant picketing was for an unlawful purpose.

Decree affirmed. Appellants pay costs.

COHEN, J., files a dissenting opinion in which EAGEN, J., joins.

MUSMANNO, J., dissents.

Dissenting Opinion

COHEN, J.

The majority opinion determines that because the picketing occurred on private property it constituted a trespass and, as such, was properly enjoined by the court below. The majority have chosen to regard the rights attendant to private ownership of property but not the burdens which attach thereto. Thoughout the law, there is recognized the principle that even owners of private property must observe and conform to certain community standards in the use and maintenance of their land, as witness the law of nuisance, zoning and negligence of property owners. And, most especially, as witness the law of labor relations. In *Thornhill v. Alabama,* 310 U.S. 88 (1940), the United States Supreme Court held that peaceful picketing is entitled to the same constitutional protection as other forms of free speech. In *Thornhill,* the pickets were employees of the picketed employer, with whom they had a labor dispute. Only a year later, the Supreme Court extended the constitutional protection under *Thornhill* to a situation wherein the pickets were not employees of the picketed establishment but were members of a union which had unsuccessfully attempted to organize the establishment's employees. *A.F.L. v. Swing,* 312 U.S. 321 (1941). Such "stranger picketing" is, therefore, constitutionally protected. The instant matter cannot be resolved by an analysis limited to the rights associated with private property. Concomitant to these rights are certain restrictions, one of which is that freedom of speech and freedom of the press often require that the rights of private ownership yield. In *Marsh v. Alabama,* 326 U.S. 501 (1946), the Supreme Court stated, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who

use it." 326 U.S. at 506. In *Marsh*, the Court held that the constitutional guarantees of freedom of the press and of religion precluded the enforcement of a state criminal statute against a Jehovah's Witness who distributed religious literature on a street of a company owned town. The court reasoned that because the street was open to the public in general and, though privately owned, served a public function, private management could not curtail precious constitutional liberties.

In the sense that both are freely accessible to the public, a company town and a shopping center are analogous arrangements, and for purposes of considering possible constitutional abridgments should be similarly analyzed. Accordingly, I deem unincisive the majority's failure to recognize any conflict between the rights of private ownership and the constitutionally guaranteed freedoms of speech and of the press. Just as there exists a conflict between the right to distribute printed religious matter in a company town and a statute restricting such activity, so too there exists a conflict between a union's right to picket peacefully and a shopping center's policy not to permit such activity within the boundaries of the center. Only by a thorough consideration of these conflicting values can the issue herein presented be properly resolved.

A case involving a related issue is *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1953), wherein the Seventh Circuit decided that a company owned street which divided the store and which was used only occasionally by employees and customers to enter the store, partook of the nature of a city street to an extent sufficient to invalidate a company rule prohibiting non-employees from engaging in union activity in the street. As one observer commented, shopping center grounds are possessed of more attributes of a public way than the Marshall Field owned street because the public would use the shopping center public ways to a far greater extent than

it could use the company owned street. Note, Shopping Centers and Labor Relations Law, 10 Stanford L. Rev. 694, 701 (1958).

Perhaps the most sensible appraisal of what an appellate court must know to decide a shopping center picketing case was set forth in two cases: (1) *Moreland Corporation v. Retail Store Employees Union Local No. 444, AFL-CIO,* 16 Wis, 2d 499, 114 N. W. 2d 876 (1962), wherein the Supreme Court of Wisconsin in an action by the owner of a shopping center seeking an injunction restraining defendant union from picketing on a sidewalk in front of a tenant's store in the center, stated:

> "The issue is whether the respondent, because it has designed its private property for use as a shopping center, has lost its right to ban otherwise lawful picketing. If the record before us clearly established that the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center must yield to the rights of freedom of speech and communication which attend peaceful picketing. See Freeman v. Retail Clerks Union Local No. 1207, supra, (concurring opinion). See also, Notes, 1960 Duke L.J. 310; Note 73, Harv. L. Rev. 1216, and Note 10, Stanford L. Rev. 694. Compare, Marsh v. Alabama (1946), 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265, in which the United States Supreme Court held that the freedom of religion guaranteed by the First and Fourteenth Amendments prevented the enforcement of a criminal trespass statute against a person distributing religious pamphlets on the sidewalk of a company-owned town. See also, National Labor Relations Board v. Babcock & Wilcox Co. (1956), 351 U.S. 105 76 S.Ct. 679, 100 L.Ed. 975, a decision under the National Labor Management Relations Act involving the right of labor union representatives to circulate literature in an employer's private parking lot. The rationale of the United States Supreme Court in the Babcock & Wilcox Case was used to

help resolve a constitutional free speech issue in Nahas v. Local 905, Retail Clerks Ass'n, supra [144 Cal. App. 2d 808, 301 P.2d 932, rehearing denied 144 Cal. App. 2d 820, 302 P.2d 829].

"In weighing the parties' conflicting interests of private property and free speech, we would want to know the physical characteristics of the shopping center so that our decision on this important policy question could be applied with clarity to other disputes which might arise . . . ." 114 N.W. 2d 879-880.

(2) *Freeman v. Retail Clerks Union Local No. 1207,* 363 P.2d 803 (Wash. 1961) (concurring opinion), wherein a concurring judge observed:

"Under ordinary circumstances, the owner of property can control who goes on it and for what purpose; however, a formal dedication to public use is not necessary to greatly limit that control. The legislature has imposed limitations upon the owner's right to exclude persons from his premises or to refuse service to them on account of race or creed, if the premises are used as a place of public resort. In other instances, entirely apart from the legislative action, the courts have placed a limitation on the control than an owner might exercise over his property, as in company towns.

"In this case, it is conceded that legal title to the property, over which the pickets carried their signs, was in the appellants—and not in the public. The issue presented was whether the property owners, despite their precautions and efforts to protect their right to control the use of the property, had lost the right to prevent the pickets from carrying their signs. (I take it that the pickets, sans signs, were just like other members of the public, and entitled to be where they were.)

* * *

"If instead of being a shopping center, the property in question was merely a forty-acre pasture for contented cows, but a desirable place from which

pickets could carry signs imparting information (relative to the nonunion status of the employees of J. C. Penney Company) to the customers of that company, there could be no questions that the owner would be entitled to an injunction—not to restrain the picketing, but to prevent their trespass on property where they had no right to be."

If the union activity involved herein did not amount to a trespass, then there arises the question of federal preemption. I shall avoid a lengthy discussion of that subject, but want to emphasize that the federal decisions stress the high degree of freedom allowed union activity on the property of the employer. While those cases are not controlling authority, they do indicate that the case before us is not as open-and-shut as the majority believe. Many of the federal cases are thoughtfully analyzed in Annot., 100 L.Ed. 984 (1956).

There is another basis for my disagreement with the majority. By restricting picketing to the berm areas at the entrances and exits, the majority have lent their sanction to an activity which has overtones of a secondary boycott. Again, I do not intend to discuss at length the unlawful and harmful effects which can occur to neutral employers by such activity but recommend 10 Stanford L. Rev. 694, 702-706, which considers the evils and possible cures of picketing at shopping center entrances.

Had the majority opinion made reference to the foregoing inescapable conflicts, I might not enjoy the result any more than I now do, but at least I would be satisfied that the majority opinion recognized the problems involved.

I dissent.

JUSTICE EAGEN joins in this dissent.

APPENDIX B

Opinion and Order of Court of Common Pleas of Blair County, Pennsylvania

The narrow dispute to be resolved in this proceeding is the authority of this Court to restrict the place where union picketing of a non-union business establishment may be conducted.

Pleadings

The pleadings in this case consist of the following:

(a) Plaintiffs' Complaint, with Bond and Affidavits, seeking injunctive relief prohibiting picketing and alleged trespassing on plaintiffs' property and limiting picketing to certain highway berms adjacent thereto; and

(b) Defendant union's motion for dissolution or modification of the preliminary injunction heretofore granted.

Findings of Fact

(1) Plaintiff Logan Valley Plaza, Inc. is the owner of a newly-developed and sizeable commercial complex—a shopping center—known as the Logan Valley Mall, which is situate in Logan Township at the intersection of those public highways known as Plank Road (U. S. Route 220) to the east and Goods Lane to the south.

(2) Separating the Mall from these respective highways are earthen berms at least 10 feet in average width, unbroken except for several paved entrances and exits providing ingress and egress between said highways and the Mall.

(3) Plaintiff Weis Markets, Inc. is the lessee and sole occupant of one of the only two businesses presently open and operating in the Mall (the other being a nearby Sears department store and automobile service enterprise, which is not a party to this proceeding).

(4) The Weis supermarket area proper consists of an enclosed modern market building with an open but covered porch running north and south along its front and a pick-up zone along the porch for the loading of meats and groceries into customer automobiles.

(5) Between this supermarket area and the highway berms aforesaid are extensive parking lots to the east and south of Weis; these macadam lots separate the supermarket from the berms by hundreds of feet, are constructed on the Mall premises and have parking spaces and driveways distinctively lined off on the ground. These areas constitute connecting lots or a common parking lot for Weis and Sears customers, and eventually for other shops and stores in the Mall as they open, and consequently these lessees may be said to have reciprocal rights or easements therein for the use of their business invitees and employees.

(6) On December 8, 1965 plaintiff Weis Markets, Inc. opened for business, employing a wholly non-union staff of employees.

(7) Commencing on December 17, 1965 defendant union through its representatives, none of whom are employees of either plaintiff, engaged with continuity in the following acts of picketing on the Mall premises, inter alia:

(a) small groups of men and women wearing placards reading "Weis Mkt is Non-Union these employees are not receiving union wages or other union benefits" walked back and forth in front of the Weis supermarket, more particularly in the pick-up zone adjacent to the covered porch;

(b) occasional picketing as above described has taken place on the covered porch itself;

(c) handbills have been distributed to members of the public (actual or prospective Weis customers) by said pickets containing more detailed information of the same

nature as that on the placards, but also including the following urgings: "We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market" . . . "Please Patronize Union Markets! A & P—QUAKER—ACME" . . . "We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets."

(8) While such picketing has been persisted in and may have infrequently caused temporary congestion near the supermarket entrances or sporadic stoppage of the flow of vehicles in the pick up zone, and while the pickets refused a request by the Assistant General Superintendent for Weis Markets to move off the Mall proper, the picketing has been peaceful and unaccompanied by either oral threats or actual violence.

(9) Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble.

(10) On December 27, 1965 we approved plaintiffs' Bond and issued a preliminary injunction restraining defendants from picketing on the supermarket porch, in the pick-up zone, on the Mall parking lot areas or the entrances thereto and the exits therefrom.

(11) On January 4, 1966 hearing was held and testimony taken before this Court on plaintiffs' motion to continue the injunction.

Issue

Should the preliminary injunction be dissolved on the basis that we have no authority to preclude picketing on quasi-public property?

Discussion

We need involve ourselves in no detailed discussion of our jurisdiction and power to regulate the location of

picketing of the type here engaged in so as to prevent trespassing on private property; defendant union concedes such authority, which is supported by the case law of this Commonwealth. See Weis Markets Inc. v. Local 195, AFL-CIO, 34 D. & C. 2d 700 (1964); Bloomsburg Mills, Inc. v. Textile Workers Union, Local 667, 78 D. & C. 549, 41 Luz. L. Reg. 53 (1950). A number of unreported cases decided within the past several years—all Weis Markets, Inc. v. Amalgated Meat Cutters and Butcher Workmen of North America, Local No. 195, AFL-CIO et al.—in Berks, Dauphin, Lancaster, Lebanon, Montgomery and York Counties have been brought to our attention and demonstrate how firmly settled this principle is in preservation of the sanctity of privately-owned property.

The defendant union argues, however, that the rule finds no application in the instant matter because a shopping center constitutes quasi-public property and, therefore, picketing on the Mall premises is not a trespass, but merely a lawful exercise of the constitutional right of free speech. The cases cited as controlling authority for this distinction are Great Leopard Market Corporation, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local 196, 196 A. 2d 657, 413 Pa. 143 (1964); Weis Markets, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 195, AFL-CIO et al., Equity Docket No. 13, C.C.P. Lancaster Co. (1964); and Weis Markets Inc. v. Local 195, AFL-CIO, supra.

While the Great Leopard Case did deal with the picketing of a store fronting on a parking lot both of which were situate in a shopping center, our Supreme Court holding that peaceful picketing was permissible in front and to the rear of the store, it seems significant that the pickets were all striking employees of the plaintiff store itself; a distinguishing feature in the case before us is that all of the pickets are strangers, non-employees of the plaintiff store,

none of whose workers are out on strike. There the Foodarama market was involved in labor trouble; here the Weis supermarket is not engaged in labor trouble. Logic and reason would therefore dictate that the interests of the pickets in the Great Leopard Case were so directly and vitally related to the store itself that they cannot properly be labeled trespassers. Secondly, nothing in the Great Leopard Case clearly shows that an equally suitable area outside of the shopping center but in the immediate vicinity thereof existed which could be effectively utilized as a situs for picketing; in the present case, however, plaintiffs have affirmatively shown that access to the subject property may be had only from the two highways hereinbefore described and that both have berms of sufficient width appropriate to accommodate pickets.

As for the proceeding to Equity Docket No. 13, C.C.P. Lancaster Co., its total inapplicability to the defense contention is obvious when we compare both the relative locations there prevailing and the relief therein requested with the building area and the prayer of the complaint before us here. There the Weis supermarket in the Manor Shopping Center fronted on a concrete sidewalk running along the western edge of a public highway known as Litiz Pike. It is clear that this public sidewalk is the "walk area" referred to by the court decree limiting the total number of pickets at any one time to a maximum of 5, as follows:

> "(e) Three (3) of the aforesaid pickets may picket on the curb line of the walk area immediately in front of the Weis Market Building and may not be less than ten (10) feet apart.
>
> (f) The remaining two (2) pickets may be placed by the defendants as they choose in the vicinity of the Weis Market building, but may not be on the walk area and shall be the same distance of ten (10) feet

apart from each other as well as the other three (3) aforesaid pickets."

Whether the Weis parking lot in that case was situate to the side of the supermarket or whether it intervened between the front of the supermarket and the concrete public sidewalk does not appear from the complaint, but this is immaterial. It is obvious that the "walk area" was neither a part of the Weis supermarket proper nor on the shopping center premises whatsoever, but rather occupied a location essentially the same as the highway berms in the present case; that is to say, the "walk area" was a boundary of and immediately outside the shopping center, separating it from the highway called Lititz Pike. We do not interpret that part of the decree allowing 2 pickets to be placed "in the vicinity of the Weis Market building" as permitting limited picketing either on the supermarket porch or in the adjoining parking lot; our belief is that it means they shall picket off the premises anywhere beyond the public sidewalk. Even should defendant union's unsupported inference have merit, that either or both paragraphs (e) and/or (f) of the decree above-cited sanction picketing on the shopping center premises, the answer is that such paragraphs are verbatim wording of paragraphs (j) and (k), respectively, of the relief requested in the complaint; in this event the inescapable observation would be that plaintiff there was not trying to exclude picketing from the shopping center, and if such an issue was not involved, the case is inapposite to the situation now ours for disposition.

Defendant relies upon the dictum at p. 703 of Weis Markets Inc. v. Local 195, AFL-CIO, supra, wherein the opinion comments that other jurisdictions as well as Pennsylvania (in the Great Leopard Case) have determined that unions may enter upon shopping center premises for purposes of picketing business establishments located therein because of the quasi-public nature of such premises. We

have already distinguished the Great Leopard Case from the particular facts in the instant case and, absent controlling appellate direction in our own Courts, we need not bow to the authority of decisions from sister-states when the wisdom of their rulings is debatable. We would point out to defendant the words following thereafter at pp. 703-04:

> "Defendants argue that plaintiff has invited the public generally to enter upon its property . . . . The fault in this argument is that plaintiff has invited the public to enter upon its property, park their automobiles and shop in the store. *There is no direct or implied invitation to anyone to enter upon the property for the purpose of driving prospective customers away.* * * *
>
> * * * If defendants were to be permitted on plaintiff's property for peaceful picketing purposes, it would be no different than to claim that a civil rights group had the right to hold a demonstration or a rally on plaintiff's property, or a political rally or a religious service, or a dance, or an athletic contest, or any other public gathering. In our judgment its rights of private property were not relinquished or destroyed when plaintiff constructed its store and paved the remainder of its land for a parking area. Simply stated, it is our opinion that no one has a right to go on plaintiff's property except those who it invites, specifically or by implication, and defendants were not only not invited but were requested to leave." (Emphasis added.)

While we are in complete accord with the above-cited observation of Judge Johnstone relative to private property, we fail to see why it should not have equal force relative to shopping centers. Such a commercial premises may properly be classified as quasi-public only for the use of

lessees, employees and business invitees, and those not falling within either group are not upon the premises for the purposes for which the enterprise was constructed and intended. Pickets should be precluded from arguing successfully the quasi-public nature of the Mall unless they can demonstrate their inclusion within those classes of the public expressly or impliedly invited to use the shopping center property. To us the very employment of the term "quasi-public" by the defendant manifests its full realization that the invitation is limited or qualified, and not extended to the whole general public as such regardless of purpose. Would the defense seriously contend that one has the right to park his vehicle on the Mall parking lot in order to shop at a store located off of the Mall premises? To argue that such action does not constitute a trespass would be ridiculous. The pickets in this case are certainly in no better position, to say the least.

It is unnecessary for us to base our decision solely on the ground of trespass to realty, however. Regardless of this question, we entertain no doubt that we do not have the right totally to prohibit the picketing of the Weis supermarket, but we are invested with authority to balance the equitable considerations and to impose reasonable controls, which is all that plaintiffs seek by their complaint. Cf. Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, Etc., 37 D. & C. 337 (1939). The nature of the handbills which have been distributed borders on conduct evidencing a "course of conduct intended or calculated to coerce an employer to compel or require his employees to . . . become members of or otherwise join [defendant] labor organization", in which case the picketing, although peaceful, is for an unlawful purpose. See the Labor Anti-Injunction Act of 1937, June 2, P. L. 1198, Sec 4(b) (as amended), 43 P.S. Sec. 206d(b); Anchorage, Inc. v. Waiters & Waitresses Union, Local 301 et al., 119 A. 2d 199, 383 Pa. 547 (1956);

Flashner v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 195, Etc., supra; Twin Grill Company, Inc., et al. v. Local Joint Executive Board et al., 60 D. & C. 379 (1947). Even peaceful picketing, as here, may be unlawful because of the objective or end result which is sought.

The purpose of picketing is to exert stronger influences than those which may be accomplished by the employment of other modes of communication. When peaceful picketing is accompanied by the distribution of handbills of a strictly informative and factual nature, it is a proper exercise of the constitutional right of freedom of speech; it is quite another matter, however, when such handbills go beyond this stage and approach intimidation of that vulnerable segment of the public who may desist from patronizing plaintiff's establishment, not out of sympathy or agreement with defendant union's cause, but out of apprehension for individual wellbeing. Defendant may say that the handbills here involved merely appeal to and request shoppers to make their purchases elsewhere, but from the repeated emphasis "NOT TO PATRONIZE" it might well appear to the scanning recipient of one of these handbills that his or her right to choose is limited and that the notice is meant to serve as an implicit mandate or warning.

Not being specifically requested directly to restrict defendant union in the use of handbills we will refrain from so doing. We will, however, discourage whatever possibility of personal confrontation may otherwise exist by making permanent the injunction as previously decreed. By limiting the pickets to the highway berms we are not diminishing their ability to communicate with and inform the public, since there are no other means of vehicular adit to or exit from the Mall premises; we are thereby actually increasing their audience, for the placards or banners will be plainly legible to passing motorists on both highways. In

addition, the berms are of sufficient width to serve as appropriate walkways without exposing the pickets to traffic perils—it would seem to us that greater danger to their physical welfare had existed in the Weis pick-up zone where they were in direct line of vehicular traffic, moving however slowly. They will be still in the vicinity and clearly within view of the Weis supermarket.

We rest our authority on the holding in Wortex Mills, Inc. v. Textile Workers Union of America, C.I.O. et al., 85 A. 2d 851, 857, 369 Pa. 359, 369 (1952), wherein our Supreme Court summarized the case law on this point as follows:

> "A STATE COURT MAY ENJOIN UNLAWFUL PICKETING OR PICKETING WHICH IS CONDUCTED IN AN UNLAWFUL MANNER OR FOR AN UNLAWFUL PURPOSE. PICKETING, IF PEACEFUL, ORDERLY AND FOR A LEGITIMATE OR LAWFUL PURPOSE, IS LEGAL AND WITHIN THE PROTECTION OF THE CONSTITUTION. HOWEVER A STATE IS NOT REQUIRED TO TOLERATE IN ALL PLACES AND IN ALL CIRCUMSTANCES EVEN PEACEFUL PICKETING BY AN INDIVIDUAL; IT IS WELL ESTABLISHED THAT THE METHOD OR CONDUCT OR PURPOSE OR OBJECTIVE OF THE PICKETING MAY MAKE EVEN PEACEFUL PICKETING ILLEGAL." (italics the Court's)

CONCLUSIONS OF LAW

(1) The picketing in this case is being conducted in an unlawful manner and for an unlawful purpose, that is, it constitutes a trespass on the Mall premises and is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union.

(2) Under these circumstances we are not precluded from exercising reasonable controls over such picketing,

the Pennsylvania Anti-Labor, Injunction Act of 1937 (as amended) being inapplicable.

Accordingly we enter the following

ORDER

And Now, this 14th day of February, A.D., 1966, after hearing on the preliminary injunction heretofore issued in the above-captioned matter, at which hearing the defendant union was represented by counsel, and upon consideration of the testimony and exhibits adduced at said hearing, it is Ordered, Adjudged and Decreed that: (a) the defense motion to dissolve or modify said preliminary injunction be and the same is hereby denied and dismissed; and

(b) said preliminary injunction is hereby continued until further adjudication of this case or until further order of this Court, the security heretofore entered by the plaintiffs also to be continued.

By the Court,
John M. Klepser,
P. J.

APPENDIX C

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et Seq.)

SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

* * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixed, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

• • •

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

• • •

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to

recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

• • •

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without

regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

* * *

SUPREME COURT, U. S.
OCT 6 1967
JOHN F. DAVIS, CLERK

No. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION
LOCAL 590, *et al.*,
Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
Question Presented	1
Statement of the Case	1
Summary of Argument	3
POINT I—	
The decision below was decided upon an adequate and independent non-federal ground	4
A. Trespass to Private Property	4
B. Pennsylvania's Law Applies	5
C. Respondents Did Not Dedicate Their Property to Petitioners' Trespass	7
D. The Injunction Was Narrowly Drawn	8
POINT II—	
The Petitioners are precluded from raising the question of preemption before this Court	9
POINT III—	
Assuming, *arguendo*, that preemption may properly be raised before this Court, the Supreme Court of Pennsylvania is not preempted in the circumstances of the instant case	11
A. The Activity Is Not Subject to the Protection of Section 7	11
1. Not all concerted activity is protected	11
2. Non-employees may be prohibited from trespassing on private property	12

PAGE

3. The absence of organizational activity 13

4. Prevention of trespass to private property is an interest "deeply rooted" in the public policy of the state 13

5. The trial court's action has no bearing upon national labor policy, nor is it of sufficient national importance to warrant review 15

B. The Picketing Patently Did Not Violate Any Section of the Labor Management Relations Act 15

1. Clearly No 8(b)(1)(A) Violation 16

2. Clearly No 8(b)(4) Violation 16

3. Clearly No 8(b)(7) Violation 17

C. There Is No Preemption Where the Tortious Acts Are Outside the Power of the Board to Regulate 17

D. This Court Has Recognized the Inherent Right of the State to Regulate Certain Conduct Even Though Arguably Subject to the Act 18

E. Other State Courts Have Exercised Jurisdiction 19

POINT IV—

Petitioners' trespass picketing is not constitutionally protected 20

CONCLUSION 23

CITATIONS

Cases:

PAGE

Adderley v. Florida, 385 U.S. 39 ..... 7, 21, 22
Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 8
Automobile Workers v. Russell, 356 U.S. 634 18
Automobile Workers v. Wis. Board, 336 U.S. 245 ..... 12, 18

Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 20
Beaty v. Richardson, 276 U.S. 599 10
Bell v. Maryland, 378 U.S. 226 5
Brady v. Maryland, 373 U.S. 83 5
Building Service Employees v. Gazzam, 339 U.S. 532 ..... 14, 20

CIO v. McAdory, 325 U.S. 472 10
City of Cincinnatti v. White's Lessee, 31 U.S. (6 Pet.) 431 7
Cox v. Louisiana, 379 U.S. 536 21

Erie R.R. v. Tompkins, 304 U.S. 64 5

Freeman v. Retail Clerks Union, Local 1207, 58 Wash. 2d 426, 363 P. 2d 803 9
General Dynamics / Telecommunications, etc., 137 N.L.R.B. 1725 12
Good v. Dow Chemical Co., 247 S.W. 2d 608; *cert. denied* 344 U.S. 805 22

Henry v. Mississippi, 379 U.S. 443 4
Herb v. Pitcairn, 324 U.S. 117 4
Hood v. Stafford, 213 Tenn. 684, 378 S.W. 2d 766 19
Hughes v. Superior Court, 339 U.S. 460 ..... 14, 20

PAGE

Kelly v. Bell Tel. Co., 72 Montg. 236, 70 York 35 6
Kramer v. Slattery, 260 Pa. 234, 103 A. 610 6

Linn v. United Plant Guard Workers, 383 U.S. 53 ....13, 14
Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union, Local 590, 425 Pa. 382, 227 A. 2d 874 .....4, 5, 6, 19

Machinists v. Gonzalez, 356 U.S. 617 .....17, 18

NLRB v. Allis-Chalmers Mftg. Co., 388 U.S. 175 16
NLRB v. Babcock & Wilcox, 351 U.S. 105 .....8, 12, 13
NLRB v. Drivers Local 639, 362 U.S. 274 16
NLRB v. Electrical Workers, 346 U.S. 464 12

People v. Goduto, 21 Ill. 2d 605, 174 N.E. 2d 385; *cert. denied,* 368 U.S. 927 19
Plumbers' Union v. Borden, 373 U.S. 690 17

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 .....11, 13, 15
State v. Martin, 199 La. 39, 5 So. 2d 377 22

Teamsters Union v. Hanke, 339 U.S. 470 .....14, 21
Teamsters Union v. Vogt, 354 U.S. 284 .....14, 21
Thornhill v. Alabama, 310 U.S. 88 23

United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 5
United Workers v. Laburnum Corp., 347 U.S. 656 17

PAGE

Statutes:

National Labor Relations Act (61 Stat. 316, 29 U.S.C. §141, et seq.) 11

Miscellaneous:

87 C.J.S. *Trespass*, §13 (1954) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, *et al.*,

Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

Question Presented

Whether this Court should exercise its jurisdiction to review an Order of the Supreme Court of Pennsylvania, affirming the continuance of a preliminary injunction, enjoining Petitioners from trespassing on private property within a shopping center.

Statement of the Case

Respondent Weis Markets, Inc. is the owner-occupant of one of two stores which, at the time of the commencement of this proceeding, were within the shopping center owned

by Respondent Logan Valley Plaza, Inc. (R. 33a, 88a). The plaza is located at Altoona, Pennsylvania, within the intersection of public highways known as Plank Road (U.S. Route 220) to the east, and Goods Lane to the South (R. 87a).

On December 8, 1965, Weis opened for business. A few days thereafter it posted a sign on its property reading as follows:

> "No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management." (R. 33a, 34a).

On December 17, 1965, pickets appeared in front of the store (R. 28a, 29a). None of the pickets were employees of Weis (R. 38a, 89a).

The pickets picketed within Weis' parcel pick up area. This area is located alongside the front of the store; it is four to five feet wide and is marked off with yellow lines. It is set aside from the store's parking lot so that customers may conveniently have their purchases loaded into their automobiles by Weis employees (R. 29a, 55a, 84a). Occasional picketing also took place on the covered porch (R. 89a).

Twelve of the pickets were employed at three A & P stores in the area; two were employed at the Acme store, and one at the Quaker store (R. 66a, 67a). In addition to picketing, these employees of Weis' competitors distributed handbills to members of the public, asking them to patronize A & P, Acme and Quaker super markets, instead of Weis' store (R. 89a).

On the evening of December 21, 1965, there were thirteen pickets in the parcel pick-up zone. They marched two, three, and often four abreast (R. 32a, 47a). Customer

traffic was disrupted. Customers were forced to "navigate in and out" among the pickets to avoid hitting them (R. 30a, 44a, 47a).

Weis' Assistant General Superintendent advised the pickets that they were picketing on private property. He called their attention to the no-trespassing sign, and requested that they picket on the berms of the road. The berms separate the Mall from the respective highways (R. 88a). The pickets refused (R. 32a, 33a).

The picketing in front of the store continued daily (except December 24, 1965) until December 27, 1965, at which time the Court of Common Pleas of Blair County directed that it be removed to the berm areas (R. 32a).

Summary of Argument

The Court should not grant certiorari, as the decision below was decided on the adequate and independent non-federal ground of trespass to private property.

The Petitioners seek to raise the question of preemption before this Court. They are precluded from doing so, not having raised it before the Supreme Court of Pennsylvania. Assuming, *arguendo*, that federal preemption may properly be raised, the state courts of Pennsylvania are not preempted in the circumstances of the instant case. Nor is Petitioners' trespass picketing constitutionally protected. Consequently, the Court should not take jurisdiction herein.

POINT I

The decision below was decided upon an adequate and independent non-federal ground.

A. *Trespass to Private Property*

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Herb* v. *Pitcairn*, 324 U.S. 117, 125; *Henry* v. *Mississippi*, 379 U.S. 443, 446.

The instant matter presents such a case. The state court decision is based *solely* upon the non-federal ground of trespass to private property. The Supreme Court of Pennsylvania framed the issue as follows:

> "Our immediate inquiry is whether, in the factual matrix of the case at bar, the conduct of these pickets constituted an invasion of the *private property* of Weis and/or Logan." 425 Pa. 382, 386, 227 A. 2d 874, 877. (Emphasis added)

The court added:

> "These pickets . . . had no right or authority whatsoever to utilize the *private property* of Weis and/or Logan for such picketing purposes; *such use constituted a trespass* which very properly was restrained." 425 Pa. at 389, 227 A. 2d at 878. (Emphasis added)

The Respondents sought injunctive relief not as employers, nor as parties to a labor dispute,[1] *but as property*

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[1] There was no labor dispute. The Court of Common Pleas so found: "Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble." (R. 90a). " . . . Weis . . . is not engaged in labor trouble." (R. 92a).

owners. They alleged no unfair labor practice, but rather a violation of Pennsylvania Property Laws, and their property rights.

By Petitioners' own admission, it was *not* seeking to organize the Weis employees, but sought to enter upon Weis' property for the purpose of informing the public that the store was non-union. (Petition for Writ of Certiorari, page 2).

The Respondents did not seek to prohibit the picketing. They only sought to have it regulated. The state court did not prohibit it. It only relocated it to berms adjacent to Respondents' property.

It is clear, therefore, that the decision of the Supreme Court of Pennsylvania affirming the Court of Common Pleas' granting of injunctive relief was based *solely* upon the non-federal question of trespass to private property.[2]

B. *Pennsylvania's Law Applies*

The finding by the State of Pennsylvania in the instant matter that the complained of acts constitute a trespass within the framework of the Pennsylvania common law, is a determination that this Court will follow.

The uniform practice of this Court has been to concede that the state courts speak with final authority on questions of state law. This proposition has consistently been reflected in this Court's decisions. *Erie R.R.* v. *Tompkins,* 304 U.S. 64, 78. *Accord, Bell* v. *Maryland,* 378 U.S. 226, 237; *United Gas Pipe Line Co.* v. *Ideal Cement Co.,* 369 U.S. 134, 135; *Brady* v. *Maryland,* 373 U.S. 83, 90.

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[2] In fact, the Supreme Court of Pennsylvania, in noting that the trespass to private property was a reasonable ground upon which to grant injunctive relief, deemed it "unnecessary to determine whether the instant picketing was for an unlawful purpose." 425 Pa. at 389, 227 A.2d at 878.

There can also be little question that the non-federal ground of trespass to private property *adequately* supports the state's decision.

The law of Pennsylvania is that every unauthorized entry upon the real property of another is a trespass. 87 C.J.S. *Trespass,* §13 (1954). Trespass *quare clausum fregit* lies where there is the doing of an unlawful act, or the doing of a lawful act in an unlawful way, to the detriment of another's property. *Kelly* v. *Bell Tel. Co.,* 72 Montg. 236, 70 York 35.

The courts of Pennsylvania have inherent jurisdictional authority to enjoin picketing on private property and have done so upon countless prior occasions. The Court of Common Pleas in the instant matter recognized this inherent right when it noted:

> "We need involve ourselves in no detailed discussion of our jurisdiction and power to regulate the location of picketing of the type here engaged in so as to prevent trespassing on private property; defendant union concedes such authority, which is supported by the case law of this Commonwealth." (R. 90a).[3]

Upon review, the Supreme Court of Pennsylvania also noted:

> "That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: (Citations omitted)." 425 Pa. at 386, 227 A. 2d at 876-77.

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[3] Equitable relief is proper, since the trespass is continuing, and damages are difficult, if not impossible, to ascertain. *Kramer* v. *Slattery,* 260 Pa. 234, 103 A. 610.

This Court has long recognized this right of the state to protect the property of its citizens. It recently stated:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida,* 385 U.S. 39, 47.

C. *Respondents Did Not Dedicate Their Property to Petitioners' Trespass*

The Logan Valley Plaza is private property. This fact is conceded by Petitioners. (Petition for Writ of Certiorari, page 14). There has been no attempt to open the Logan Valley Plaza to free and uninhibited use by the public and there has never been, nor is there presently, any intention of making the Plaza a public area.

In order for the property to be considered open for the public's general use, there would have to be some form of common law dedication. For there to be such dedication, there must be assent of the owner and "the fact of its being used for the public purposes intended by the appropriation." *City of Cincinnati* v. *White's Lessee,* 31 U.S. (6 Pet.) 431, 440. Can it be said that Respondents have dedicated their land for use by the public in a manner detrimental to the very purpose of the land itself? The land is for business purposes, whereas the purpose of the picketing was to drive business away.

The no-trespassing sign which Weis had posted, clearly evidenced an intent to restrict the use of the area to business purposes only.

Indisputably, Weis did not invite its competitors' employees to confront its customers in front of its store with placards and handbills. Unquestionably, there was no invitation to these thirteen pickets to advertise their employer's attributes at Weis' storefront.

D. *The Injunction Was Narrowly Drawn*

The Respondents did not seek to prohibit the Petitioners from picketing them. Their *only* request of the Pennsylvania state courts was that the location of the picketing be regulated. The Court of Common Pleas did not enjoin all picketing, but merely removed the pickets from the Respondents' private property, to the berms outside of the shopping area. It did not deprive Petitioners of the right to picket. On the contrary, it recognized this right by permitting picketing in the berm areas. Nor did it deprive Petitioners of their opportunity to communicate with the public. It increased this opportunity. In this connection, the Court of Common Pleas stated:

> "By limiting the pickets to the highway berms we are not diminishing their ability to communicate with and inform the public, since there are no other means of vehicular adit or exit from the Mall premises; we are thereby actually increasing their audience . . ." (R. 98a).

Thus, the Petitioners could reach the public through "other available channels of communication" at a nearby and equally appropriate location. *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 112.

Although this Court may not sustain a state court's prohibition of a union's picketing "in its entirety," it has *not* held that a state injunction "aimed narrowly at a trespass" in a shopping center is improper. See *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 24-25, where the question "whether a State may frame and enforce an injunction aimed narrowly at a trespass" was left open.[4]

[4] This Court's remand to the state was interpreted by the Washington Supreme Court as sanctioning such narrowly drawn injunctions when in a concurring opinion four members of the court stated:

POINT II

The Petitioners are precluded from raising the question of preemption before this Court.

The issue of preemption was not argued before the Supreme Court of Pennsylvania. Therefore, under this Court's holdings it may not be raised here.

The Petitioners in their "Motion to Dissolve or Modify Preliminary Injunction" before the Court of Common Pleas did raise the issue of preemption arguing that the complained of activity was removed from the sphere of state action by virtue of the Labor Management Relations Act.

The Petitioners, however, abandoned this argument when the matter came before the Pennsylvania Supreme Court.

The fact that the issue of federal preemption was raised at the trial level is not enough. It must also have been pursued on appeal. This Court is precluded from reviewing a federal question that has not been preserved on appeal in the state courts. Failure to pursue the federal issue on appeal will be deemed a waiver of this issue.

In the case of *CIO* v. *McAdory,* 325 U.S. 472, this Court denied review of a federal question that, although raised at the trial level, was abandoned on appeal to the state supreme court. This Court noted:

"Unless the court there believed it possible to frame an injunction and enforce an injunction aimed narrowly at a trespass, it did a vain and useless thing in making a remand to the state court.

"Until the Supreme Court of the United States holds that the law of trespass is no longer applicable to pickets under any circumstances, the state courts not only have the right, but the duty to determine the extent to which pickets may utilize the property of nonparticipants in a labor dispute." *Freeman* v. *Retail Clerks Union, Local 1207,* 58 Wash. 2d 426, 434, 363 P. 2d 803, 807-08.

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been presented to that court for decision, we are without jurisdiction to consider it in the first instance here." 325 U.S. at 477.

Also, in another decision this Court dismissed for want of jurisdiction for the reason that "the federal questions sought to be presented were by the record abandoned in the State Supreme court." *Beaty* v. *Richardson*, 276 U.S. 599.

Clearly, therefore, the federal question of preemption now raised, having been abandoned before the Supreme Court of Pennsylvania, cannot be reviewed by this Court.

POINT III

Assuming, *arguendo*, that preemption may properly be raised before this Court, the Supreme Court of Pennsylvania is not preempted in the circumstances of the instant case.

This Court in its landmark decision in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, stated its rule with respect to when a state court is ousted from asserting jurisdiction in labor cases. In this decision it was noted, however, that where there is a ". . . clear determination that an activity is neither protected or prohibited . . ." by the Act, *the state courts can exercise jurisdiction.* 359 U.S. at 246.

Both Board and court precedent in this area clearly establish that the complained of activity cannot be considered subject to either the protection of Section 7 or the prohibition of Section 8 of the Act.

A. *The Activity Is Not Subject to the Protection of Section 7*

1. Not all concerted[5] activity is protected

Although Section 7 of the Act gives "employees" the right of concerted activity, it cannot be said that this Section's intent is that all "concerted" activities are to be provided the protection of the Act under all circumstances. For example, if a retailer were to direct his employees to picket a competitor, urging the competitor's customers to transfer their business, this would not be concerted activity within the meaning of Section 7 of the Act. Here we have knowledge and acquiescence (R. 9a and 17a), rather than explicit direction. However, in either case the fruits

[5] It is not conceded that the activity herein was concerted.

of the activity are the same—more business for the competitors and less for Weis. Surely, Section 7 cannot be stretched so far as to embrace such unfair competitive tactics.[6]

In *Automobile Workers* v. *Wis. Board,* 336 U.S. 245, 257, this Court noted that not "... every type of concerted activity is beyond the reach of the state's adjudicatory machinery." Nor is "... otherwise illegal action ... made legal by concert." 336 U.S. at 258. Similarly, in *NLRB* v. *Electrical Workers,* 346 U.S. 464, employee activity going beyond the pale was held by this Court to be outside Section 7.

2. Non-employees may be prohibited from trespassing on private property

If certain illegal conduct by an employer's employees can be considered without the protection of Section 7 of the Act, certainly, unlawful activities on the part of non-employees can be afforded no greater protection. In fact, this Court has recognized that non-employees may be entirely barred from entering upon a private parking lot. In *NLRB* v. *Babcock & Wilcox,* 351 U.S. 105, this Court distinguished between rules of law applicable to employees and those applicable to non-employees. This Court stated:

> "No restriction may be placed on the employees' right to discuss self-organization among themselves . . . *But no such obligation is owed nonemployee organizers.*" 351 U.S. at 113. (Emphasis added)[7]

---

[6] Not to be overlooked is that the picketing began only nine days after Weis commenced business. Query: Is competitive picketing a new way to recoup lost sales?

[7] The National Labor Relations Board follows this distinction in its interpretation of the Act. In *General Dynamics/Telecommunications, etc.,* 137 N.L.R.B. 1725 it held that distribution of literature on a private street by non-employees was not protected by the Act.

3. The absence of organizational activity

The complained of activity has nothing whatsoever to do with the right of Weis' employees, or any other employee, to engage in self-organization or concerted activities as traditionally defined under the Act.[8] Unlike *Babcock, supra,* it did not even have an organizational object. This picketing, conducted by non-employees, was conceded to be an intrusion upon private property for the purpose of driving customers away from Respondent Weis. Obviously, this was not the type of activity intended to be within the coverage of Section 7 of the Act.

4. Prevention of trespass to private property is an interest "deeply rooted" in the public policy of the state

In *Garmon, supra,* this Court noted that:

> ". . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act." (Citations omitted) 359 U.S. at 244.

More recently, in *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, this Court, in holding that an employer had a cause of action for libel in state court, noted:

> ". . . the States need not yield jurisdiction . . . 'where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not

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[8] The record is completely barren of any reference to organizational activity on the part of the Petitioners. They were not seeking to organize Weis' employees through the means of the picket line, or independent thereof.

> infer that Congress had deprived the states of the power to act.'" 383 U.S. at 59.

This Court has upon many occasions upheld injunctions, where the complained of activities were in contravention of a valid public policy of the state. In *Hughes* v. *Superior Court,* 339 U.S. 460, this Court held proper the use of the injunction to prohibit picketing of a place of business solely to secure compliance with a demand that its employees be hired in a percentage to the racial origin of its customers.

In *Teamsters Union* v. *Hanke,* 339 U.S. 470, this Court held that the state was not restrained from enjoining picketing of a business conducted by the owner himself with no employees where the intent of the picketing was to enforce union demands for this business to become a union shop. Also, in *Building Service Employees* v. *Gazzam,* 339 U.S. 532, this Court affirmed a state's injunction against picketing where the state held that it was in violation of its statutory policy against employer coercion of employees' choice of a bargaining representative.

In *Teamsters Union* v. *Vogt,* 354 U.S. 284, this Court stated that its prior discussions:

> ". . . established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." 354 U.S. at 293.

5. The trial court's action has no bearing upon national labor policy, nor is it of sufficient national importance to warrant review

This Court's intent in limiting state action in *Garmon,* 359 U.S. 236, 242, was to minimize the danger of state interference with national policy.

The trial court's enjoining of picketing and removing it from private property to a public area does not in any way run the risk of state interference with activity even remotely touching upon national labor policy.

Where *Garmon, supra,* was concerned with the exercise of state power which would threaten interference with the "clearly indicated policy of industrial relations," 359 U.S. at 243, the facts here indicate action that does nothing to threaten this policy. At most, the complained of activity could be considered merely a "peripheral concern" of the Labor Management Relations Act and not considered preempted under *Garmon,* 359 U.S. at 244.

Furthermore, the judgment in this case is of importance only to the litigants herein. It cannot possibly have national significance or importance. Nothwithstanding the development of shopping centers in this country, the issue in this case—the right of non-employees to picket for non-organizational purposes on private property within a shopping center—has been seldom raised in the past. Nor is it likely to be raised again in the future.

B. *The Picketing Patently Did Not Violate Any Section of the Labor Management Relations Act*

None of the allegations of Respondents' Complaint to the trial court praying for injunctive relief, alleged that Petitioners had committed acts which constituted unfair labor practices, nor were there any acts complained of which could be interpreted as unfair labor practices.

1. Clearly No 8(b)(1)(A) Violation

Recently this Court in holding that there was no violation of this section of the Act referred to its legislative history and noted that the mischief against which the statute inveighed ". . . was restraint and coercion by unions in *organizational campaigns.*" *NLRB* v. *Allis-Chalmers Mftg. Co.*, 388 U.S. 175, 186.[9] (Emphasis in original)

Thus, there could be no violation here, since the Petitioners were not engaged in an organizing campaign. Its picketing was directed solely to the public and "was peaceful and unaccompanied by either oral threats or actual violence." (Petition for Writ of Certiorari, page 6).

2. Clearly No 8(b)(4) Violation

There was no secondary boycott. The pickteing was primary, not secondary. It was directed toward "members of the public (actual or prospective Weis customers) . . ." (R. 89a).[10] The picketing took place immediately in front of the Weis store and the name "Weis Markets" was clearly identifiable on the signs (R. 89a).

There was no attempt by the Petitioners to "induce . . . any (employee) to strike . . . or refuse to . . . perform any service;" nor did Petitioners "threaten, coerce, or restrain any person," as provided in the statute.

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[9] To the same effect see *NLRB* v. *Drivers Local 639*, 362 U.S. 274, 286, where this Court recognized that the "note repeatedly sounded" by Congress, in enacting Section 8(b)(1)(A), was ". . . the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal."

[10] That the picketing was directed to the public cannot be questioned (R. 89a). Petitioners' Writ to this Court under "Questions Presented" p. 2, notes that there was " . . . peaceful picketing at the premises of the store located within a shopping center informing the public . . ." The handbills also were addressed to the public (R. 89a).

3. Clearly No 8(b)(7) Violation

Was the object of the picketing herein to "force or require Weis to recognize or bargain with Petitioners?" There was no such allegation by Respondents; the Petitioners do not so contend. Nor was the object for the purpose of forcing Weis' employees to select Petitioners as their representative. On the contrary, the object of the picketing, in the Petitioners' own words, is for the ". . . purpose of informing the public . . ." (R. 23a). As such, there can be no violation of this section of the Act.

Nor do Petitioners allege to the contrary. Rather, Petitioners are unsure of how to characterize the picketing. They argue that the picketing is ". . . either within or outside the scope of Section 8(b)(7)(C)." (Petition for Writ of Certiorari, page 25). Surely, this Court would not "preempt" a state court of jurisdiction premised on such a tenuous position.

C. *There Is No Preemption Where the Tortious Acts Are Outside the Power of the Board to Regulate*

Where the alleged tortious act concerns "matters wholly outside the scope of the National Labor Relations Board's determination" the state is not preempted from acting. *Machinists* v. *Gonzalez,* 356 U.S. 617, 622.

Similarly, where ". . . Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *United Workers* v. *Laburnum Corp.,* 347 U.S. 656, 665. The Act certainly ". . . did not require mutilation of 'the comprehensive relief of equity.' (Citation omitted)." *Plumbers' Union* v. *Borden,* 373 U.S. 690, 697.

Congress has not given the National Labor Relations Board any authority to enjoin or to act in any manner concerning a union's trespass to private property. Clearly the complained of activity in the present case "is governable by the State or it is entirely ungoverned." *Automobile Workers* v. *Wis. Board,* 336 U.S. 245, 254.

D. *This Court Has Recognized the Inherent Right of the State to Regulate Certain Conduct Even Though Arguably Subject to the Act*

This Court has upheld the right of a state tribunal to regulate certain conduct even though the conduct was admittedly or arguably subject to the National Labor Relations Act.

In *Machinists* v. *Gonzalez, supra,* this Court in considering a suit brought in the state court by a union member for restitution of his membership and for damages for his illegal expulsion, recognized that the circumstances imbedded in such a suit could constitute an unfair labor practice under 8(b)(2) of the Act. Nevertheless, this Court held in part that the state could act because the possible conflict between the Board and the state court in this type of case did not "'. . . present potentialities of conflicts in kind or degree which require a hands-off directive to the states.'" 356 U.S. at 622.

Similarly, in *Automobile Workers* v. *Russell,* 356 U.S. 634 this Court allowed the state to entertain a non-union employee's common law tort action against a labor union to recover compensatory and punitive damages for malicious interference with his lawful occupation. State action in this matter was allowed even though it was assumed that the facts of the case indicated a violation of 8(b)(1)(A) of the Act. This Court noted that Congress had not ". . . deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered." 356 U.S. at 641-42.

E. *Other State Courts Have Exercised Jurisdiction*

The *Illinois Supreme Court* exercised jurisdiction to enforce its criminal trespass statute against union organizers on a retail store's parking lot. The court stated:

> "We believe that the maintenance of domestic peace and the absence of any preventive relief for the protection of the employer's property rights is of sufficient importance to give our State courts jurisdiction to enforce the criminal trespass statute under the circumstances of this case." *People* v. *Goduto,* 21 Ill. 2d 605, 611-12, 174 N.E. 2d 385, 388; *cert. denied,* 368 U.S. 927.

Similarly, the *Supreme Court of Tennessee* upheld its jurisdiction to sustain a finding of trespass by union members in the parking area of a retail store. The court stated:

> "Under the present state of the law, freedom of speech does not entitle one to come upon the property of another and commit a trespass and, while in the act of thus trespassing, seek to persuade the public not to trade with such other. . . . (I)n our opinion, the ordinance is valid and enforceable in the State Courts." *Hood* v. *Stafford,* 213 Tenn. 684, 697-98, 378 S.W. 2d 766, 772.

The *Supreme Court of Pennsylvania,* in the present case emphatically stated:

> "That the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass is clear beyond question: (Citations omitted)." 425 Pa. at 386, 227 A. 2d at 876-77.

The enjoining of a trespass to private property by a state is certainly a matter that cannot involve a conflict

between the state and the Board which would require a hands-off policy by the state. Therefore, for all of the above reasons, Pennsylvania's action in the present case cannot be held to be preempted.[11]

POINT IV

Petitioners' trespass picketing is not constitutionally protected.

Petitioners' request assertion of jurisdiction by this Court on the ground that their freedom of speech was abridged. This claim is wholly specious. This Court's absolute equation of picketing and free speech has long been discarded:

"Picketing . . . is more than free speech . . ."

Wohl.[12]

". . . picketing (is) not . . . the equivalent of speech . . ."

Hughes.[13]

". . . picketing is more than speech . . ."

Gazzam.[14]

---

[11] As noted above at page 9, although Petitioners raised the question of federal preemption in the lower court, they abandoned this issue in the Supreme Court of Pennsylvania. Obviously, this was no oversight on Petitioners' part. The only conclusion is that Petitioners felt that their argument concerning federal preemption was of little merit.

[12] *Bakery Drivers Local 802* v. *Wohl,* 315 U.S. 769, 776 (concurring opinion).

[13] *Hughes* v. *Superior Court,* 339 U.S. 460, 465.

[14] *Building Service Employees* v. *Gazzam,* 339 U.S. 532, 537.

". . . picketing . . . cannot dogmatically be equated with . . . freedom of speech . . . . [P]icketing is 'indeed a hybrid.'"

Hanke.[15]

". . . a State, in enforcing some public policy . . . (may) constitutionally enjoin peaceful picketing . . ."

Vogt.[16]

"The rights of free speech and assembly . . . do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

Cox.[17]

"We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as . . . picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Cox.[18]

"Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute . . ."

Adderley.[19]

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[15] *Teamsters Union* v. *Hanke,* 339 U.S. 470, 474.

[16] *Teamsters Union* v. *Vogt,* 354 U.S. 284, 293.

[17] *Cox* v. *Louisiana,* 379 U.S. 536, 554.

[18] *Id.* at 555.

[19] *Adderley* v. *Florida,* 385 U.S. 39, 47.

> "... the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please ... was vigorously and forthrightly rejected in ... *Cox* v. *Louisiana* ... We reject it again."
>
> *Adderley.*[20]

Thus, this Court unequivocally holds that trespass picketing may be enjoined.

In sum, the trial court's narrowly drawn injunction did not violate Petitioners' freedom of speech. The injunction certainly did not diminish Petitioners' ability to communicate with the public; on the contrary, its public audience was increased.

Under these circumstances, Petitioners may not argue that their speech was silenced or their constitutional rights abridged. The law will not "sanction trespass in the name of freedom."[21]

---

[20] *Id.* at 47-48.

[21] "... freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin." *State* v. *Martin*, 199 La. 39, 47, 5 So. 2d 377, 380; quoted in *Good* v. *Dow Chemical Co.*, 247 S.W. 2d 608, 611; *cert. denied* 344 U.S. 805.

CONCLUSION

In *Thornhill* v. *Alabama,* 310 U.S. 88, 105, this Court stated:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

Respondents submit that Pennsylvania followed this precept when it acted to protect the property of Respondents from trespass. Its narrowly drawn injunction did not conflict with any federally protected rights. Thus, no federal question is presented, nor is the matter of sufficient importance to national labor policy to warrant an assertion of jurisdiciton. The Writ should be denied.

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October 9, 1967

SUPREME COURT, U. S.

OCT 11 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

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No. 478

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v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

REPLY BRIEF FOR PETITIONERS

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1. The importance and recurrence of the questions presented, requiring determination by this Court, are illustrated by two cases reported since the petition was filed. In *Weis Markets* v. *Retail Store Employees' Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct.,

August 18, 1967), which involves the very respondent-employer in this case and concerns its operation of a store at Hagerstown, Maryland, the court dismissed an action seeking to enjoin nonemployee union members from handing out leaflets at the store's leased premises located on a tract of land shared by another store and adjacent to a shopping center. The court observed that (*id.* at 2167):

> The Court finds there was no trespass. A modern shopping center has characteristics differentiating it from private property. A shopping center, inviting the public to come patronize it, takes on the nature of a quasi-public place. The owner's rights become secondary to broad use by the public, which includes the right of a labor union to engage in peace picketing.

The court alternatively concluded that "it does not have jurisdiction" because exclusive power to adjudicate the controversy rests with the NLRB (*id.* at 2167-2168).

Similarly illustrative of the recurrence of the questions is *Blue Ridge Shopping Center* v. *Schleininger,* 65 LRRM 2911 (Mo., July 10, 1967), in which the Missouri Supreme Court declined on state procedural grounds to entertain an appeal from an injunction prohibiting union officers, agents, members and employees "from soliciting or distributing handbills, printed matter or leaflets in and upon the Blue Ridge Shopping Center . . . or in any way interfering with the customers, invitees, or other persons thereon" (*id.* at 2912).

Reported cases are merely the visible cap of the iceberg, for there are many unreported *nisi prius* deter-

minations, as exemplified by the references in the opinion of the Court of Common Pleas in this case to numerous unreported Pennsylvania decisions (Pet. pp. 15a, 16a, 17a). This case, furthermore, is entirely typical of the generality of shopping center cases. As with all the cases cited at pp. 12-13 of the petition, so with this case, nonemployees picket or handbill the premises of a store within a shopping center communicating the store's disfavored labor policy.

2. The decision below of course does not rest upon an adequate and independent nonfederal ground. To affix the local label of trespass to the enjoined conduct does not answer the question whether the state has impaired freedoms protected by the Federal Constitution or taken in hand activity that Congress has by statute preempted or safeguarded. "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties. . . . And similarly the technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decisions regarding the scope of the vital liberties guaranteed by the Constitution." Mr. Justice Frankfurter concurring in *Marsh* v. *Alabama,* 326 U.S. 501, 511. And so, as this Court held in the latter case, "determination of the issue of 'dedication' does not decide the question under the Federal Constitution here involved" (*id.* at 505, n. 2).

The same is true of the question under the National Labor Relations Act. "Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the dispo-

sition of unrelated local problems. Consequently, . . . 'the federal law must prevail no matter what name is given to the interest or right by state law.'" *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 123-124. The "vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of an important national labor policy." *Rabouin* v. *N.L.R.B.,* 195 F. 2d 906, 910 (C.A.2.). "Controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser Busch,* 348 U.S. 468, 480; *Local 24, Teamsters* v. *Oliver,* 358 U.S. 297.

3. The brief in opposition urges that, while the preemption question was raised at the trial level, it was not pursued on appeal and therefore cannot be presented to this Court (br. in opp. pp. 9-10). But the preemption question was plainly before the court below. It was contained in the printed record on appeal in the precise form in which it had been presented to the trial court (R. 26). Preemption was an explicit alternative ground articulated in the dissenting opinion (Pet. p. 11a). And its inapplicability was forcefully argued by respondents themselves in their brief below. In reliance on this Court's reservation of the question in *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, and invoking the concurring opinion in *Freeman* v. *Retail Clerks Union, Local No. 1207,* 58 Wash. 2d 426, 363 P. 2d 803, respondents urged that the power of the lower court to issue an injunction addressed to trespass had not been preempted (res. br. below pp. 17-19). They similarly cited and quoted *People* v. *Goduto,* 21 Ill. 2d 605, 610, 174 N.E. 2d 385,

cert. denied, 368 U.S. 927, and *Hood* v. *Stafford,* 213 Tenn. 684, 378 S.W. 2d 766, to sustain state power to regulate picketing as a trespass notwithstanding preemption (*id.* at 20-22). And they argued "tacit approval" by this Court, said to be inferable from this Court's denial of certiorari in *Goduto,* urging that the "Supreme Court has never hesitated to grant certiorari when it believes a state entered a forbidden area of labor relations. See e.g. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 . . .; *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 . . .; *Plumber's Union* v. *Borden,* 373 U.S. 690 . . .; *Iron Workers* v. *Perko,* 373 U.S. 701 . . ." (*id.* at 21). In these circumstances, to contend that the preemption question was not sufficiently presented to the court below, particularly in view of its conceded explicit tender to the trial court incorporated in the printed record on appeal in the precise form that it had been raised in the trial court (R. 26), is to "resort to an arid ritual of meaningless form." *Staub* v. *Baxley,* 355 U.S. 313, 320.

Furthermore, preemption goes to the power of the state court over the subject matter of the controversy (*In re Green,* 369 U.S. 689), and is therefore jurisdictional. "Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time." *Gainesville* v. *Brown-Cummer Investment Co.,* 277 U.S. 54, 59. See also, *Seaboard Air Line Co.* v. *Daniel,* 333 U.S. 118, 122-123, where this Court *sua sponte* passed upon a state court's jurisdiction although it had been conceded below and not questioned in this Court.

The questions tendered are important and recurrent; judicial opinion is divided; the record presents the

questions in typical context and unclouded fashion; this Court should therefore grant certiorari.

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October 1967

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ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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MOTION OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Retail Clerks International Association (RCIA), an international, parent labor union which has in excess of one-half million members, respectfully asks leave to file a brief as *amicus curiae* in this case for the following reasons:

1. The RCIA is the largest labor union in the world whose members are employed exclusively in the retail industry. Tens of thousands of its members are presently employed in retail establishments which are situated in shopping centers of the very kind involved in this case.

2. The RCIA engages in extensive efforts to organize and to bring the benefits of collective bargaining to unorganized retail industry employees. A substantial number of these organizing campaigns each year involve employees who

work in stores located in privately owned shopping centers of the very kind involved here. Because the RCIA organizes and represents employees in every sector of the retail industry, the impact of the Court's decision in the case at bar will be greater for the RCIA than for any other labor organization in the United States by far. Moreover, the significance of the issues in the instant case to the RCIA is increasing with each passing day, for the indisputable trend in American retailing, both in the cities and in the suburbs, is towards shopping centers and complexes housing a number of retail establishments under a single roof on privately owned land.

3. The RCIA has been a party to a majority of the cases involving the issue of whether labor organizations have a constitutional as well as a federally guaranteed statutory right to communicate with employees on privately owned shopping center property. See *e.g., Arlan's Dept. Store of Charleston (Retail Clerks),* Case No. 9-CA-3308 (1965); *Freeman* v. *Retail Clerks,* 363 P.2d 803 (Wash. 1961); *Green* v. *Retail Store Employees,* 49 LRRM 3059 (Pa.Ct. Cm.Pls. 1961); *Illinois* v. *Goduto,* 211 Ill.2d 605, 174 N.E.2d 385 (1961), cert. denied 368 U.S. 927 (1961); *Illinois* v. *Mazo,* 44 LRRM 2881 (Ill. Cir. Ct. 1959); *Maryland* v. *Williams,* 44 LRRM 2357 (Baltimore City Crim. Ct., Md. 1959); *Moreland Corp.* v. *Retail Store Employees,* 144 N.W.2d 876 (Wis. 1962); *Nahas* v. *Retail Clerks,* 301 P.2d 932, 302 P.2d 829 (Calif. Dist. Ct. App. 1956); and *Retail Fruit & Vegetable Clerks (Crystal Palace Market),* 116 NLRB 856 (1956), enforced 249 F.2d 591 (C.A. 9 1957).

4. The experience of the RCIA in facing the problems of communicating with employees on privately owned shopping center property covers a period of several decades. This experience has involved not only civil injunction proceedings of the type involved here, but also a number of criminal trespass cases and cases before the National Labor Relations Board. Moreover, the RCIA's experience with this problem is reflected in unreported decisions which are not generally available.

5. While the RCIA has great confidence in the ability of counsel for petitioners to argue fully and fairly the implications of the issues involved in the instant proceeding, the RCIA believes that its unique experience may be useful to the Court in exploring the dimensions of the issues raised by this case. In its *amicus* brief, if permission to file such a brief is granted, the RCIA will delineate specific ways in which the application of state trespass-after-warning statutes have been used to prevent communication with employees in shopping centers and thereby to frustrate substantial federal rights and interests.

6. Counsel for petitioners have consented to the RCIA's filing a brief as *amicus curiae*. Counsel for the respondents have refused permission to the RCIA to file such a brief for the sole reason that "the case before the Court will factually involve a simple trespass only in one shopping center and one store.[1]" We believe that the Court's granting *certiorari* to this proceeding suggests that the Court may regard the case as one which involves the rights of all workers in shopping centers throughout the land.

7. Because of the RCIA's great interest in the outcome of this proceeding as well as because of its unprecedented experience in litigation involving the precise issues involved here, the RCIA's experience and views may be of some aid to the Court. If permission is granted to file a brief as *amicus curiae*, it will be short and relevant, so that the Court's time will not be misspent.

Respectfully submitted,

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November, 1967

[1] Letter from Robert Lewis, counsel for respondents, to counsel for RCIA dated November 10, 1967.

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RESPONDENTS' OBJECTIONS TO MOTION OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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RESPONDENTS' OBJECTIONS TO MOTION OF RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Respondents respectfully oppose the motion by the Retail Clerks International Association (RCIA) for leave to file a brief as *amicus curiae* for the following reasons:

1. The RCIA has failed to set forth reasons for believing that the issues before the Court will not adequately be presented by the parties as required by Rule 42(3) of this Court's Rules. Indeed, in paragraph 5 of its motion the RCIA states that it has "great confidence in the ability of counsel for the Petitioners to argue fully and fairly the implications of the issues involved in the instant proceeding."

2. The RCIA, as a labor organization, has interests and views compatible with that of Petitioner, a labor organization. While the Respondents believe that the Court should have the benefit of *amicus* briefs for its consideration, it is submitted that the permission sought by the RCIA to file a brief will not assist the Court, since it will be cumulative. For example, it states in paragraph 4 of its motion that it proposes to cite to the Court "unreported decisions that are not generally available." The Petitioner contemplates doing the same.[1] Moreover, citation of unreported decisions will not materially aid the Court in its determination of the issues in this case.

3. The RCIA cites decisions in paragraph 3 of its motion which are not relevant to the issues before the Court in the instant matter. Unrelated issues asserted in nonsimilar factual situations cannot aid the Court but can only obfuscate the simple issues before the Court.

4. The RCIA, in its motion, indicates that the Court's granting certiorari to this proceeding suggests that the Court may regard the case as one involving the rights of all workers in shopping centers throughout the land. Respondent submit that such an assumption is totally unwarranted.

---

[1] Letter to Michael Rodak, Jr., Deputy Clerk of the Court, from Bernard Dunau, counsel for Petitioners, requesting an extension of time within which to file Petitioners' brief. The letter states the reason for the request for extension as being: "We have undertaken a nationwide survey among attorneys to ascertain the frequency of unreported judicial action and police action in situations of the type which the instant case typifies."

5. For the reasons stated herein, the Respondents have withheld consent to the RCIA's filing a brief as *amicus curiae* and oppose its motion for permission to do so.

Respectfully submitted,

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	11
ARGUMENT	18
I. Prohibition of Peaceful Picketing Within A Shopping Center As a Trespass Abridges Freedom of Speech	18
II. Peaceful Picketing in a Labor Dispute is Within the Exclusive Regulatory Scope of the National Labor Relations Act and Therefore Within the Field Preempted by the National Labor Relations Board Whether or not Conducted Inside a Shopping Center	30
A. A State Court Enters the Preempted Domain of the NLRB Insofar as it Enjoins Peaceful Picketing, and the Circumstance That the Picketing Is Conducted Within a Shopping Center Does Not Empower the State Court to Act	31
B. The Confinement of A Labor Dispute to an Employer and his Employees Adopts a Standard that Congress has Repudiated, and the Non-employee Status of the Pickets is Irrelevant in the Scheme Congress Adopted to Regulate Peaceful Stranger Picketing	37
C. Divorcement of the Picketing from the Immediate Locale of the Disfavored Store Within the Shopping Center, Relegating it to the Distant Highway Entrances Serving all Establishments	

Page

Within the Center, Conflicts With the Accommodation that Congress has made Between Protected Primary Activity and Prohibited Secondary Pressure 42

D. The State Court Entered The Preempted Domain of The NLRB By Enjoining Peaceful Picketing Within The Shopping Center 50

III. The Decision of The State Court Conflicts With Federally Protected Rights And Therefore Cannot Stand Even If The State Court Is Empowered To Ajudicate The Controversy 55

CONCLUSION 56

APPENDIX, Relevant Provisions of the National Labor Relation Act, as Amended (61 Stat. 29 U.S.C. § 141, et seq.) 57

AUTHORITIES CITED

CASES:

Adderley v. Florida, 385 U.S. 39 23
Aetna Freight Lines v. Clayton, 228 F. 2d 385 (C.A. 2), cert. denied, 351 U.S. 950 40
Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W. 2d 785 22
American Federation of Labor v. Swing, 312 U.S. 321 ..... 10, 13, 23
Arlan's Dept. Store of Charleston, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965 35
Automobile Workers v. Wisconsin Board (Briggs-Stratton), 336 U.S. 245 53
Blue Ridge Shopping Center v. Schleininger, 65 LRRM 2911 (Mo., July 10, 1967) 26
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 27
Brown Shoe Co. v. United States, 370 U.S. 294 9
Building Service Union v. Gazzam, 339 U.S. 532 19
Chauffeurs Local Union 795 v. Newell, 356 U.S. 341 .. 19
Deaton Truck Lines v. Local Union 612, Teamsters, 314 F. 2d 418 (C.A. 5) 39
Division 1287, Amalgamated Association v. Missouri, 374 U.S. 74 56

Page

Dougherty v. Virginia, 199 Va. 515, 100 S.E. 2d 754 .. 41
Edwards v. South Carolina, 372 U.S. 229 23
Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716 (C.A. 2) 33
Fontainebleau Hotel Corp. v. Hotel Employees Union, 92 So. 2d 415 40
Freeman v. Retail Clerks Union Local No. 1207, 58 Wash. 2d 426, 368 P. 2d 803 54
Garner v. Louisiana, 368 U.S. 157 .....22, 28
Garner v. Teamsters Union, 346 U.S. 485 .....32, 53
Great Western Broadcasting Co. v. N.L.R.B., 356 F. 2d 434 (C.A. 9) 45
Guss v. Utah Labor Relations Board, 353 U.S. 1 52
Hague v. C.I.O., 307 U.S. 496 21
Hanna Mining Co. v. MEBA, 382 U.S. 181 .....53, 54
Harlan Fuel Co., 8 NLRB 25 36
Hillsborough Township v. Cromwell, 326 U.S. 620 9
Honolulu Typographical Union No. 37 (Hawaii Press Newspapers), 167 NLRB No. 150 44
Hotel Employees Union v. Sax Enterprises, 358 U.S. 270 40
Houston Building and Construction Trades Council (Claude Everett Const. Co.), 136 NLRB 321 39
Hughes v. Superior Court, 339 U.S. 460 29
International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 .....27, 28
International Hod Carriers Union, Local No. 41 (Calumet Contractors Association), 133 NLRB 512 39
International Hod Carriers Union, Local 840 (C. A. Blinne Constr. Co.), 135 NLRB 1153, n. 29 40
Liner v. Jafco, 375 U.S. 301 54
Local No. 438 Construction Union v. Curry, 371 U.S. 542 ..... 8, 9
Local 24, Teamsters v. Oliver, 358 U.S. 283 56
Local Union No. 471, Plumbers (Keith Riggs Plumbing and Heating Contractor), 137 NLRB 1125 39
Local 761, I.U.E. v. N.L.R.B., 366 U.S. 667 .....43, 44
Lombard v. United States, 373 U.S. 267 21
Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 9
Mahon v. Milan Mfg. Co., 368 U.S. 7, reversing 240 Miss. 358, 127 So. 2d 647 41
Marsh v. Alabama, 326 U.S. 501 .....10, 12, 20

Page

Marshall Field & Co., 98 NLRB 88, enforced as modified, 200 F. 2d 375 (C.A. 7) 33
Maryland v. Williams, 44 LRRM 2357 (Md. Crim. Ct. June 10, 1959) 21, 54
Milk Wagon Drivers Union v. Meadowmoor Dairies. 312 U.S. 287 .....9, 19, 25
Mills v. Alabama, 384 U.S. 214 9
Moore Dry Dock Co., 92 NLRB 547 43
Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W. 2d 876 22
N.A.A.C.P. v. Button, 371 U.S. 415 27
Nahas v. Local 905, Retail Clerks, 144 Cal. App. 2d 808, 301 P. 2d 932, 302 P. 2d 829 26
Nash v. Florida Industrial Commission, No. 48, October Term, 1967 55
N.L.R.B. v. Babcock & Wilcox, 351 U.S. 105 34
N.L.R.B. v. Cities Service Oil Co., 122 F. 2d 149 (C.A. 2) 33
N.L.R.B. v. Denver Bldg. Trades Council, 341 U.S. 675 43
N.L.R.B. v. Drivers Local Union No. 639, 362 U.S. 274 41
N.L.R.B. v. Fruit & Vegetable Packers, 377 U.S. 58.....24, 31, 32, 45
N.L.R.B. v. S. & H. Grossinger's Inc., 372 F. 2d 26, (C.A. 2), enforcing as modified, 156 NLRB 233 ... 33
N.L.R.B. v. Hearst Publications, 322 U.S. 111 32
N.L.R.B. v. Insurance Agent's Internation Union, 361 U.S. 477 53
N.L.R.B. v. International Rice Milling Co., 341 U.S. 665 43
N.L.R.B. v. Lake Superior Corp., 167 F. 2d 147 (C.A. 6) 33
N.L.R.B. v. Local Union No. 55, 218 F. 2d 226 (C.A. 10) 44
N.L.R.B. v. Service Trade Chauffeurs, 181 F. 2d 65 (C.A. 2) 44
N.L.R.B. v. Servette, Inc., 377 U.S. 46 45
N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226 .....33, 36
NL.R.B. v. United Aircraft Corp., 324 F. 2d 128 (C.A. 2), cert. denied, 376 U.S. 951 33
National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 612 44

Page

New Jersey v. Green, 56 LRRM 2661 (N.J. Cty. Ct., April 29, 1964) 26
Pholps Dodge Corp. v. N.L.R.B., 313 U.S. 177 37
Pocatello Building & Construction Trades Council v. C. H. Elle Const. Co., 352 U.S. 884, reversing 77 Idaho 514, 297 P. 2d 519 41
Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 9
Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 36
Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 ... 9
Retail Clerks International Association, Local No. 560 v. J. J. Newberry Co., 352 U.S. 987, reversing 78 Idaho 85, 298 P. 2d 375 41
Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 NLRB 856, enforced, 249 F. 2d 591 (C.A. 9) 44
Sales Drivers v. N.L.R.B., 229 F. 2d 514 (C.A.D.C.), cert. denied, 351 U.S. 972 44
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 ..... 17, 50
Schneider v. Irvington, 308 U.S. 147 24
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rep. 233, 394 P. 2d 921, cert. denied, 380 U.S. 906 ..... 24, 30, 34
Seafarers International Union v. N.L.R.B., 365 F. 2d 585 (C.A.D.C.) 44
Sears. Roebuck & Co., 151 NLRB 1356 4
St. Louis, Iron Mountain & So. Ry. Co. v. Southern Express Co., 108 U.S. 24 9
Steelworkers v. N.L.R.B., 376 U.S. 492 ..... 31, 36, 43
System Federation v. Wright, 364 U.S. 642 9
Thornhill v. Alabama, 310 U.S. 88 ..... 19, 35
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 55
United Mine Workers, District 12 v. Illinois State Bar Assn., No. 33, October Term, 1967 27
Waxman v. Virginia, 371 U.S. 374, reversing 203 Va. 257, 123 S.E. 2d 381 41
Weis Markets, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708 4
Weis Markets v. Retail Store Employees' Union Local No. 692, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967) 4, 22, 54
Youngdahl v. Rainfair, 355 U.S. 131 ..... 17, 32, 50

STATUTES: Page

National Labor Relations Act, as amended 61 Stat. 316, 29 U.S.C. § 141 ..... 2, 57
28 U.S.C. § 1257 ..... 2, 9

MISCELLANEOUS:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, three Justices dissenting, is reported at 227 A.2d 874 (R. 101). The opinion of the Court of Common Pleas of Blair County, Pennsylvania, is unreported (R. 87-99).

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on March 21, 1967 (R. 101, 106). An order was entered on June 6, 1967 by Mr. Justice William J. Brennan, Jr., extending the time for filing a petition for a writ of certiorari to August 18, 1967. The petition for a writ of certiorari, filed on August 10, 1967, was granted on October 23, 1967. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). See, *infra,* p. 8, n. 4.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, *et seq.*), are set out in the Appendix (*infra,* pp. 57-60).

QUESTIONS PRESENTED

A state court injunction prohibits, as trespass on private property, peaceful picketing at the premises of a store located within a shopping center informing the public that the store "is Non-Union, these employees are not receiving union wages or other union benefits." The questions presented are (1) whether this prohibition abridges freedom of speech in violation of the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution; (2) whether the state court is without jurisdiction to ajudicate the controversy because the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the sole competence of the National Labor Relations Board; and (3) whether the prohibition forbids the exercise of the federal right to engage in "concerted activities for . . .

mutual aid or protection" guaranteed by Section 7 of the National Labor Relations Act.

STATEMENT

Logan Valley Mall is a shopping center (R. 87, 101). Owned by Logan Valley Plaza, Inc. (Logan), it is a newly-developed and sizeable commercial complex (R. 87, 86). Its perimeter spans about 5,740 feet or 1.1 miles (R. 86). It is situated in Logan Township, near the City of Altoona, Pennsylvania, at the intersection of two public highways known as Plank Road (U.S. Route 220) to the east and Good's Lane to the south (R. 87, 101). Plank Road is a heavily traveled highway, with cars moving at very good speed (R. 45, 50). Of the five entrances to the shopping center, three are located on Plank Road and two on Good's Lane (R. 86, 59-60, 49-50). The shopping center is separated from the highways by earthen berms, unbroken except for the five paved entrances providing ingress and egress between the highways and the center (R. 88). At entrances 1 and 2, the berm is 15 feet in width from the highway to the edge of the ditch; at entrances 3, 4, and 5, 12 feet in width; and the paved entrances are 20 feet in width (R. 35-37).

At the time of the events in this case, the shopping center was occupied by Weis Markets, Inc. (Weis) and Sears, Roebuck and Co. (Sears) (R. 88). Other occupants were of course expected (R. 88, 51, 59, 73, 101, 104).[1] Sears operates a department store

[1] We are informed that at present, in addition to Weis and Sears, the shopping center is occupied by the following 15 enterprises: Penney's, First National Bank, Ormand's Girl Shop, Murphy's 5 & 10, Mall Barber Shop, Thrift Drugs, Miller's Auto Supply, Kinney's Shoe Store, Father N Son Shoe Store, Seni's Hair Fashions, De Roy's Jeweler, Singer Sewing, Lester's Dress Shop, Schiff's Shoes, and Book and Record Shop.

and an automobile service station (R. 88, 101). Weis operates a supermarket engaged in selling food and sundry household articles (R. 88, 101). The business operations of Weis and other occupants of the shopping center affect interstate commerce and their labor relations are therefore governed by the National Labor Relations Act.[2]

The Weis property consists of an enclosed modern market building with an open but covered porch running north and south along its front and a pick-up zone directly along the porch for unloading purchased goods into customer's cars (R. 88, 101). The pick-up zone, 4-5 feet in width and 30-40 feet in length, is marked off with yellow lines (R. 55, 101, n. 2); it can accommodate three, possibly four, cars (R. 55). Between the supermarket area and the highway berms are extensive parking lots to the east and south of Weis; these

[2] The NLRB has often exercised jurisdiction over Weis. *Weis Markets*, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708. Weis is "engaged in the sale of food and sundry household articles, employing approximately two thousand two hundred persons in its business, and having its principal place of business at . . . Sunbury, Pennsylvania" (R. 6). Its store at the shopping center, No. 40 (R. 20), is one of twenty-nine in its Northern Division (R. 38, 28). In the overall Weis "operates 52 retail food stores (12 in shopping centers) in 36 communities in Central Pa. within a 125-mile radius of Sunbury. All stores sell groceries, meats, bakery products, produce, dairy products, frozen foods and health and beauty aids, tobacco and certain other nonfood items"; its net sales in 1965 were $111,024,294 and its net income $4,659,103; it has 3,055,000 shares of common stock listed on the New York Stock Exchange. Standard & Poor's Corporation Records, T-Z, p. 2751 (1966). Weis also operates two stores in Maryland. *Weis Markets* v. *Retail Store Employees Union, Local No. 692*, 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967). Sears is of course a national enterprise over which the NLRB regularly exercises jurisdiction (*e.g.*, *Sears, Roebuck & Co.*, 151 NLRB 1356), as is J. C. Penney Co., identified as an occupant of the shopping center on the latter's plan (R. 86, 79; *e.g.*, *J. C. Penney Co.*, 151 NLRB 53).

macadam lots have parking spaces and driveways distinctly lined off on the ground; these areas constitute a common parking lot for Weis and Sears customers, and eventually for other stores in the center as they open (R. 88, 101). There are also pedestrian ways (R. 86). The distance across the parking lots from the highway entrances to the Weis property is 350 feet at entrances 1 and 2, further from entrance 4, and 450-500 feet at entrance 5 (R. 34-35). Entrance 5 is the main entrance to the shopping center, and the most heavily used (R. 39, 60). Except for entrance 3, used primarily for access to the Sears automobile service station (R. 63-64, 40), all entrances are used by customers shopping at both Weis and Sears, and eventually other stores (R. 39-41, 50, 63-64).

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees (R. 89). Beginning on December 17, 1965, small groups of men and women picketed the Weis store within the shopping center wearing placards reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits. Amalgamated Food Employees Union Local 590" (R. 89, 29, 102, n. 3). They walked back and forth in front of the Weis supermarket, primarily at the pick-up zone adjacent to the covered porch (R. 89). The average number of pickets was variously estimated at 5, 6, or 7 (R. 39, 61-62). All were members of petitioner Union (R. 66). They were employed by A & P, Quaker, and Acme, neighboring stores, and volunteered to picket at Weis on their own time (R. 66-68, 73-74, 102, n. 3). They were not and never had been employees of Weis (R. 92, 106). The picketing was peaceful and unaccompanied by either oral threats or actual violence (R. 90, 101, 102, 106).

A few days after it opened for business on December 8, Weis posted a sign between its entrance and exit doors reading, "No trespassing or soliciting is allowed on Weis Market porch or parking lot by any one except Weis employees without the consent of the management" (R. 33-34, 105). On December 20, Weis' Assistant General Superintendent approached the individual he thought was in charge of the arriving pickets (R. 32). After ascertaining that they intended to picket, the superintendent stated, "Do you know you are picketing on private property? . . . [T]his property belongs to Weis Markets. . . . [The Weis property ends] Out along the highway right at the edge of the macadam. . . . If you want to picket do your picketing out there" (R. 33).

On December 27, 1965, at the instance of Weis and Logan, the Court of Commons Pleas of Blair County issued an *ex parte* injunction prohibiting all picketing within the shopping center, and in consequence limiting the picketing to the highway berms (R. 6-21, 98, 102, n. 4). The order enjoined the Union and its members *inter alia* from (R. 20):

> (a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area.
>
> (b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc. located at Logan Valley Mall, including parking area and all entrances and exists leading to said parking area.

After the *ex parte* injunction issued, picketing was conducted on the highway berms at the entrances to

the shopping center, two pickets at entrance 5, two at entrance 4, and one or two at entrances 1 and 2 (R. 62). Entrance 3 primarily served the Sears automobile service station, and when that fact was ascertained, picketing at that entrance was discontinued (R. 64). When picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59). The handbills read: "We appeal to our friends and members of organized labor NOT TO PATRONIZE this non-union market". . . . "Please Patronize Union Markets! A & P—Quaker—Acme". . . . "We still retain the right to ask the public NOT to patronize non-union markets and the public has the right NOT TO PATRONIZE non-union markets" (R. 89, 102, n. 3).

On January 4, 1966, the Union moved to dissolve the *ex parte* injunction (R. 22-26). It urged that (1) "the activity here complained of amounts to nothing more than peaceful, informational picketing by Union Members for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc., at said store . . ." (R. 22-23); (2) "the area whereon the defendant was conducting a peaceful and lawful picketing in a shopping center, pedestrian and parking area and as such, constitutes quasi-public property even though privately owned" (R. 24); (3) "picketing [at the highway entrances] indirectly affects other tenants of the Logan Valley Plaza, Inc. Shopping Center which in no way is desired by the defendant" (R. 25); and (4) "by reason of the Labor Management Relations Act, 29 USCA §§ 141 et seq., your Honorable Court is without jurisdiction in this labor dispute whatsoever . . ." (R. 26).

After an evidentiary hearing the Court of Common Pleas ruled against the Union (R. 87-100). It held

that the picketing "constitutes a trespass on the Mall premises and is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99).[3] It decided that the pickets were not within the class to whom the shopping center had been opened; "Such a commercial premises may properly be classified as quasi-public only for the use of lessees, employees and business invitees, and those not falling within either group are not upon the premises for the purposes for which the enterprise was constructed and intended" (R. 95-96). It therefore rejected the Union's argument that "a shopping center constitutes quasi-public property and, therefore, picketing on the Mall premises is not a trespass, but merely a lawful exercise of the constitutional right of free speech" (R. 91). It did not address itself to the Union's claim that paramount federal law "has removed this type of labor dispute from the sphere of state action and thereby precludes your Honorable Court from entering any decree whatsoever in this matter" (R. 26). Accordingly, the Court of Common Pleas entered an order "making permanent the injunction as previously decreed" (R. 98).[4]

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[3] Based on the finding that the picketing was in part designed to coerce union membership, the conduct is clearly within the area preempted by the NLRB. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542. However, in affirming the *nisi prius* judgment, the Pennsylvania Supreme Court disclaimed reliance on this finding (R. 106).

[4] As described by the Court of Common Pleas, the *ex parte* injunction it had entered was a preliminary injunction (R. 90), and it made that preliminary injunction permanent after an evidentiary hearing (R. 98), in accordance with the prayer of the complaint that the "Court enter a decree preliminarily until hearing and thereafter perpetually enjoining the Defendants . . ." (R. 12). The decree entered by the Court of Common Pleas con-

On appeal, three Justices dissenting, the Supreme Court of Pennsylvania affirmed the *nisi prius* decree (R. 101-106). The court began with the premise that the picketing was "concedely peaceful in nature" (R. 101). Its companion premise was that "the Commonwealth has not only the power but the duty to preserve the property of its citizens from invasion by way of tresspass . . ." (R. 104). It therefore turned the va-

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tinued the injunction in effect "until further adjudication of this case or until further order of this Court . . ." (R. 100). This explicit retention of jurisdiction to vacate or modify an injunction operating *in futuro* is familiar equity procedure (*System Federation* v. *Wright*, 364 U.S. 642; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 298; *Los Angeles Meat Drivers Union* v. *United States*, 371 U.S. 94, 103), and does not detract from the finality of the decree (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307, n. 4; *St. Louis, Iron Mountain & So. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24; *cf.*, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70, n. 3). Furthermore, treating the *nisi prius* decree as a preliminary injunction, the judgment is nevertheless final. First, requisite finality exists because the judgment constitutes "a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state is preempted by federal law and by the exclusive power of the National Labor Relations Board . . . ." *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542, 552, 543-550. Second, apart from preemption, there is in any event "nothing more of substance to be decided in the trial court," and the judgment is therefore final for this independent reason. *Id.* at 550-551. The federal questions "have reached a definitive stop" (*Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71); as the case comes here, "the federal question is the controlling question; 'there is nothing more to be decided'" (*Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 382). See also, *Mills* v. *Alabama*, 384 U.S. 214, 217-218. Lastly, well-founded acquistion of jurisdiction on any ground empowers a court to decide the entirety of the controversy. *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 629. Upon any hypothesis, therefore, the judgment below is final within the meaning of 28 U.S.C. § 1257, and this Court has jurisdiction to decide the federal questions presented.

lidity of the peaceful picketing upon the question whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property" (R. 104). It answered that question by its determination that the shopping center had been opened "only to those members of the public who would . . . possibly contribute to the financial success of the venture" (R. 105); the "invitation to the public . . . was limited to those who might benefit Weis' and Logans' enterprises, including potential customers as well as the employees of the shopping center concerns" (R. 105). Since the pickets "certainly were not within the orbit of the class of persons entitled to the use of the property" (R. 105), the picketing, "even though . . . of a peaceful nature, . . . constituted trespass which very properly was restrained" (R. 106). The court fortified this conclusion with its observation that "the pickets were not and never had been employees of Weis" (R. 106). Based on its determination that the picketing was enjoinable as trespass, the court below deemed "it unnecessary to determine whether the instant picketing was for an unlawful purpose" (R. 106), thereby disclaiming the companion ground invoked by the Court of Common Pleas that the picketing was "designed, at least in part, to pressure Weis . . . to compel its employees to join a union" (R. 99). The Pennsylvania Supreme Court did not address itself to the question of federal preemption.

Three Justices dissented (R. 106), Mr, Justice Cohen writing a dissenting opinion (R. 107-111). Citing this Court's opinion in *A.F.L.* v. *Swing,* 312 U.S. 321, the dissent observed that " 'stranger picketing' is . . . constitutionally protected" (R. 107). Citing this Court's opinion in *Marsh* v. *Alabama,* 326 U.S. 501,

the dissent reasoned by analogy that, as the shopping center "was open to the public in general and, though privately owned, served a public function, private management could not curtail precious constitutional liberties" (R. 107-108). Trespass aside, the dissent continued, "there arises the question of federal pre-emption" (R. 111). The dissent emphasized that "federal decisions stress the high degree of freedom allowed union activity on the property of the employer" (R. 111). Furthermore, apart from the protected character of peaceful picketing, "restricting picketing to the berm areas at the entrances and exits . . . has overtones of a secondary boycott", for it risks "unlawful and harmful effects . . . to neutral employers . . ." (R. 111). The dissent regretted the failure of the majority opinion to face the "inescapable conflicts" with paramount federal law (*ibid.*).

SUMMARY OF ARGUMENT

I

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra,* p. 5). Communication of this message by peaceful picketing is the dissemination of information concerning the facts of a labor dispute which must be regarded as within that area of free discussion guaranteed by the Constitution.

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground

that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (R. 106). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. It is a complex of streets, sidewalks, parking lots, and stores open to the customer and the would-be customer, the employee and the would-be employee, the deliveryman and the salesman, the garbage collecter and the postman, and all the rest of the community that makes the center function. The shopping center is a market place whose very being inheres in its openness to the public.

But the court below holds that, unlike other members of the public, the picket with a labor message has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a special privilege insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned, for a store facing a street publicly owned must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks. "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U.S. 501, 505-506. The

shopping center takes the community in its entirety or not at all.

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (R. 106). This hoary ground has been squarely repudiated by this Court in *American Federation of Labor* v. *Swing,* 312 U.S. 321. "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ." *Id.* at 326.

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. Liberty of expression in an appropriate place cannot be abridged on the plea that it may be exercised elsewhere. This is especially so because shopping centers are numerous and growing, and access to the businesses located within them is essential if the workers' side of a controversy is to receive a fair airing.

The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property or the nonemployee status of the pickets. Neither property ownership *per se* nor the absence of a proximate

employer-employee relationship expresses *valid* state substantive policy, and therefore the ban of picketing cannot be supported on the ground that its suppression is essential to effectuation of a proper substantive governmental interest. Since the ban cannot be related to a substantive evil, it must rest on the nonverbal elements inherent in peaceful picketing standing alone. But that cannot be a proper basis for prohibiting peaceful picketing, for this characteristic of picketing would justify its ban at any time, in any place, for any reason. Yet recognition that peaceful picketing is more than speech does not mean that it is not speech at all. And as speech it is not subject to blanket suppression.

If peaceful picketing within a shopping center may be prohibited, so may leaflet distribution. For the handbill distributor, no less than the peaceful picket, is on the hypothesis of the court below a nonemployee trespasser. Yet the prohibition of leaflet distribution cannot possibly be justified by reliance upon nonverbal elements in the means of communication, for handbilling involves no patrol and evokes no responses other than those which flow from the content of the appeal itself. Since uninvited entry by nonemployees is the basis of the decision below, and that covers persons engaged in pure speech as well as admixed communication, the sole criterion for prohibition is the identity of the speaker and the message he delivers, not the mode of his address. The First Amendment does not tolerate that suppression of the freedom to communicate.

II

Constitutionality aside, peaceful picketing in a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the

field preempted by the National Labor Relations Board whether or not conducted inside a shopping center.

1. Peaceful picketing publicizing a lawful position is a preeminent expression of the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection" safeguarded by section 7 of the National Labor Relations Act. A state court therefore enters the preempted domain of the National Labor Relations Board insofar as it enjoins peaceful picketing. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution is part of its routine business. The claim that peaceful picketing may be prohibited within a shopping center because the property is private although the use is public poses the precise kind of question that the NLRB has been commissioned to decide.

2. Prohibition of peaceful picketing within the shopping center on the ground that "the pickets were not and never have been employees of Weis" (R. 106) conflicts fundamentally with the federal scheme. In defining an "employee," section 2(3) of the NLRA provides that the term "shall not be limited to the employees of a particular employer," and in defining a "labor dispute," section 2(9) of the NLRA provides that a labor-affected controversy exists "regardless of whether the disputants stand in the proximate relationship of employer and employee." The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the NLRA, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead when and how it may be conducted. Thus, even when picketing has organization or recognition as "an object," there is with certain qualifications no prohibition of "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." And picketing is not within the prohibitable scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.

It is thus apparent that to say in this case that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act.

3. The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (R. 102, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary

pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The [redacted] below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

4. The elements of the controversy thus place its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

III

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with

federally protected rights and therefore cannot stand. Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "Non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own. Accordingly, in prohibiting peaceful picketing safeguarded by the NLRA, Pennsylvania by the common law formulated and enforced by its judiciary forbids the exercise of protected rights, and it goes without saying that state law cannot supersede federal law.

ARGUMENT

I. PROHIBITION OF PEACEFUL PICKETING WITHIN A SHOPPING CENTER AS A TRESPASS ABRIDGES FREEDOM OF SPEECH.

Prohibition of peaceful picketing within a shopping center as a trespass abridges freedom of speech guaranteed by the First Amendment as it is incorporated by the Fourteenth Amendment of the United States Constitution. The pickets in this case carried signs reading "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits" (*supra,* p. 5). Communication of this message by

picketing is "the dissemination of information concerning the facts of a labor dispute [which] must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill* v. *Alabama,* 310 U.S. 88, 102.[5] "Peaceful picketing is the workingman's means of communication" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293); it is therefore "in part an exercise of the right of free speech guaranteed by the Federal Constitution" (*Building Service Union* v. *Gazzam,* 339 U.S. 532, 536-537).

The court below nevertheless affirms the prohibition of this picketing upon the primary if not sole ground that the pickets had "no right or authority whatsoever to utilize the private property" of the shopping center, and therefore peaceful picketing within it "constituted trespass which very properly was restrained" (R. 106). Peaceful picketing within a shopping center cannot be prohibited on this basis. The property is private but the use is public. A shopping center is a multi-store complex on a large tract of land with access from public ways to a parking area for motor traffic and to sidewalks fronting on the stores for walking. It is open to the customer and the window shopper, to the employees working within the stores and to the employees delivering to the stores, to applicants for employment seeking work at the stores and to salesmen seeking to sell their wares to the stores, to the garbage collector and the postman, and to all the rest of the community that makes the center function. A motorist needs no pass to drive into the center and a pedestrian no leave to walk its streets. The shopping center is a

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[5] See also, *Chauffeurs Local Union 795* v. *Newell,* 356 U.S. 341.

market place whose very being inheres in its openness to the public.

But the court below holds that, unlike the other members of the public, the picket with a labor message has not been invited to enter and therefore his unconsented presence is a prohibited trespass. And so it creates a sheltered enclave insulating the businesses within the center from peaceful picketing in front of the premises of the individual store. This special privilege relates solely to the abutment of the store on a street privately owned. A store facing a street owned by the township must bear peaceful picketing at its premises and endure the impact of the message which its disfavored labor policy evokes. Only a store facing a street owned by a private holder is given immunity from peaceful picketing conveying the identical message. Yet no interest relevant to restricting freedom of expression enters by way of the private rather than the public title to the open property on which the picket walks.

A shopping center open to that part of the public which benefits it economically cannot be closed to that part of the public seeking to disseminate an adverse message flowing from the disfavored manner in which a business inside the center operates. The shopping center takes the community in its entirety or not at all. Entry into a "business block" used as a "regular shopping center" in "a company-owned town", this Court held, could not be shut to the distribution of religious literature on the ground that "the title to the property belongs to a private corporation." *Marsh* v. *Alabama,* 326 U.S. 501, 502-503. "We do not agree," this Court explained, "that the corporation's property interests settle the question. . . . Ownership does not always

mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 505-506. A facility open to the public, "though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence." Mr. Justice Douglas concurring in *Lombard* v. *United States,* 373 U.S. 267, 275. "Fundamentally, the property involved is not 'private' any more. That is why the competing interest of freedom of speech must be served." *Maryland* v. *Williams,* 44 LRRM 2357, 2362 (Md. Crim Ct. June 10, 1959). When the consumer is invited to buy and the employee hired to work inside the shopping center, the state cannot by injunction bar the worker from informing them by peaceful picketing within the center in front of the store that the place is "Non-Union" and that "these employees are not receiving union wages or other union benefits."

Land ownership by a private holder is as irrelevant as land ownership by a governmental entity when the question is the exercise of free speech on property opened to public entry. This Court has rejected the view that a municipality is empowered blanketly to suppress the expression of First Amendment rights on public grounds because "the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof. . . ." *Hague* v. *C.I.O.,* 307 U.S. 496, 514. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communi-

cating thoughts between citizens, and discussing public questions." *Id.* at 515. When the issue is freedom of speech on grounds otherwise open to the public, it can make no difference whether title to the property is in a municipality or a private holder. Property interest *per se* is in either case equally insubstantial as a basis for a state court injunction prohibiting the expression of First Amendment rights. "Where constitutional rights are involved, the proprietary interests of individuals must give way." Mr. Justice Douglas concurring in *Garner* v. *Louisiana,* 368 U.S. 157, 181.[6]

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[6] By an equal 4-4 division the Michigan Supreme Court affirmed an order enjoining a shopping center owner from interfering with handbilling within the center, one branch of the court observing that a shopping center "is simply a modern market place", no different from "the historic public markets of earlier days", and the "public outdoor walkways and malls are equally as public during business hours regardless of whether the fee rests with a public or private freeholder." *Amalgamated Clothing Workers* v. *Wonderland Shopping Center,* 370 Mich. 547, 122 N.W. 2d 785, 796-797. As the Wisconsin Supreme Court ruled, where "the property involved is a multi-store shopping center, with sidewalks simulated so as to appear to be public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communication which attend peaceful picketing." *Moreland Corp.* v. *Retail Store Employees Union Local No. 444,* 16 Wis. 2d 499, 114 N.W. 2d 876, 879. The core of the idea was succinctly expressed in *Weis Markets* v. *Retail Store Employees Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967), involving the very respondent-employer in this case in its operation of a store at Hagerstown, Maryland, the court observing that (*id.* at 2167):

> The Court finds there was no trespass. A modern shopping center has characteristics differentiating it from private property. A shopping center, inviting the public to come patronize it, takes on the nature of a quasi-public place. The owner's rights becomes secondary to broad use by the

The court below secondarily suggests that the injunction is supportable because in this case "the pickets were not and never had been employees of Weis" (R. 106). This hoary ground has been squarely repudiated by this Court in *American Federation of Labor* v. *Swing*, 312 U.S. 321. This Court answered yes to the question whether "the constitutional guaranty of freedom of discussion [is] infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute" (*id.* at 323). "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.

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public, which includes the right of a labor union to engage in peaceful picketing.

Respondents' reliance on *Adderley* v. *Florida*, 385 U.S. 39, to support the decision below is of course misplaced. In distinguishing *Edwards* v. *South Carolina*, 372 U.S. 229, this Court exposed the fallacy of the position that respondents espouse. "In *Edwards*, the demonstrators went to the South Carolina State Capitol grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds *are open to the public*. Jails, built for security purposes, *are not*." *Id.* at 41, emphasis supplied. So here, shopping centers "are open to the public," and nothing in the denial of access to nonpublic property, whether privately or governmentally owned, can justify debarment from property open to the public and concomitant suppression of the exercise of First Amendment rights in that public place.

Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's Case.*" *Id.* at 326. Paramount federal labor policy is built on the premise that labor activity is not rightfully confined to disputants standing in the proximate relationship of employer and employee (*infra,* p. 37). In stating that workers who are not employed by the enterprise are trespassers when they picket inside the shopping center, in implied contrast to workers hired by the enterprise who are not deemed trespassers when they stop work and stay to picket, the court below is regulating labor relations in the guise of determining property interests.

Nor is the prohibition of peaceful picketing in front of the store's premises supportable on the ground that the picketing can be conducted at the distant highway entrances to the shopping center. The vicinity of the store is the natural and effective place to communicate the picket's message pertaining to that store and its labor policy. It does not justify denial of communication at that place because picketing can be conducted "at other, admittedly less advantageous, locations off plaintiff's premises." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 923, cert. denied, 380 U.S. 906. ". . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *Irvington,* 308 U.S. 147, 163. "First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Mr. Justice

Black concurring in *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58, 80. Furthermore, picketing at distant places, with the concomitant difficulty of confining the message and the response to the store at which it is directed, risks enveloping others to their detriment in a controversy in which they are unconcerned (*infra* pp. 42-49).

Prohibition of peaceful picketing within a shopping center as a trespass would ban "the workingman's means of communication"[7] in a large and growing area in which retail and service enterprises do business. "The suburban movement in America has been accompanied by a revival of the all-purpose market, recast in the form of the shopping center, a planned arrangement of individual retail units on a single large tract."[8] "By the end of 1966, there will be between 10,000 and 11,000 shopping centers in the United States and Canada, and these shopping centers will account for almost $79 billion in annual sales—or approximately 37 percent of the total retail sales in the United States and Canada. From 1964 through 1966 shopping centers enjoyed an annual increase of more than 2 percent per year in the share of total retail sales. If that growth rate continues through 1970, shopping centers will then account for more than 45 percent of the total retail sales. By the end 1966, more than $25 billion will have been invested in the United States and Canada. An obscure but perhaps interesting figure is that these shopping centers at the end of this year

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[7] *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, 293.

[8] Note, *Shopping Centers and Labor Relations Law,* 10 Stan. L. Rev. 694 (1958).

will provide almost 12 million parking spaces for cars."[9] The importance of peaceful picketing at the scene of the dispute within the shopping center is therefore self-evident. In order that the workers' side of the controversy receive a fair airing it is essential that access to the shopping center be open.[10]

As the entire justification for the prohibition of picketing, respondents repeatedly incant the slogan "picketing is more than speech" (Br. in Opp. pp. 20-22). The expression of First Amendment rights can-

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[9] Keller, *Publicity Picketing and Shopping Centers,* 111, 112, *Labor Law Developments 1967,* 13th Ann. Inst. Labor Law, Southwestern Legal Found. (1967). The source of these statistics is Kaylin, *A Profile of the Shopping Center Industry,* Chain Store Age, May 1966.

[10] "Suburbs pose new organizing problems as unions expand drives. Just entering suburban shopping centers, where the owner controls accesses and parking lots, can be tough for organisers of the Retail Clerks Union and the Hotel and Restaurant Employees Union. The clerks have won several 'trespass cases' in state courts, but, says a spokesman, it's tough 'hedgerow fighting.'" Wall Street *Journal,* June 13, 1967, p. 1, col. 5. In addition to cases cited elsewhere in this brief, for other reported instances of attempted or successful debarment from a shopping center, see *Blue Ridge Shopping Center* v. *Schleininger,* 65 LRRM 2911 (Mo., July 10, 1967); *Nahas* v. *Local 905, Retail Clerks,* 144 Cal. App. 2d 808, 301 P. 2d 932, 302 P. 2d 829; *New Jersey* v. *Green,* 56 LRRM 2661 (J.J. Cty. Ct., April 29, 1964). Reported cases are merely the visible cap of the iceberg, for there are many unreported *nisi prius* determinations, as exemplified by the references in the opinion of the Court of Common Pleas in this case to numerous unreported Pennsylvania decisions (R. 91, 92), and many police actions which never reach court. The instant case is entirely typical of the generality of shopping center cases. The common pattern is that nonemployees picket or handbill the premises of a store within a shopping center communicating the store's disfavored labor policy.

not be silenced so simplistically. The ingredients in peaceful picketing which differentiate it from pure speech do not justify suppression of its message at the natural and effective place of its dissemination in the name of naked title to property or the nonemployee status of the pickets. Neither property ownership *per se* nor the absence of a proximate employer-employee relationship supports a valid governmental interest sufficient to prohibit peaceful picketing. Its ban is therefore not sustainable as a necessary step to realization of a "*valid* state policy in a domain open to state regulation." *International Brotherhood of Teamsters* v. *Vogt,* 354 U.S. 284, 291 (emphasis supplied). While petitioners have "amply shown" that their "activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner[s]' activities, which can justify the broad prohibitions which it has imposed." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 444; *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, 7-8. See also, *United Mine Workers of America, District 12* v. *Illinois State Bar Assn.,* No. 33, October Term, 1967, sl. op. p. 5, decided December 5, 1967.

Justification of the ban must accordingly rest, not upon the need to effectuate a valid substantive governmental object with which peaceful picketing is incompatible, but merely on the nonverbal elements inherent in peaceful picketing standing alone. But if the nonverbal elements of peaceful picketing were alone a sufficient basis for its prohibition, it could be banned at any time, in any place, for any reason. Yet it goes without saying that "the mere fact that there is 'pick-

eting' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing." *International Brotherhood of Teamsters* v. *Vogt,* 354 U.S. 284, 294-295. Since no substantive evil exists to support the ban of picketing, all that is left to justify its prohibition would be the manner in which it was conducted. In this case, however, both courts below were emphatic that the picketing was peaceful (R. 90, 101, 102, 106). If it were not, a curb of its excesses would be justified, not its prohibition.

In short, to say that picketing is more than speech is not to say that it is not speech at all. As speech it is constitutionally protected. The message it imparts cannot be suppressed simply on the ground that as a means of communication peaceful picketing entwines verbal and nonverbal elements. "This Court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, . . . to mere verbal expression." Mr. Justice Harlan concurring in *Garner* v. *Louisiana,* 368 U.S. 157, 201.

The fallacy of the respondents' argument is revealed by the fact that, were the State's justification for prohibiting peaceful picketing within a shopping center valid, it would be quite as valid as a justification for prohibiting the distribution of handbills within the center. For the handbill distributor, no less than the peaceful picket, is on the hypothesis of the court below a nonemployee trespasser. His entry into the center is equally uninvited whether he comes to broadcast leaflets or carry a placard, and his purpose in either case is to publicize the nonunion status of the disfavored store to

its economic disadvantage. Indeed, in this case, the Court of Common Pleas was ready to enjoin the distribution of handbills. It desisted with the observation that "not being specifically requested directly to restrict defendant union in the use of handbills we will refrain from so doing" (R. 98). And, but for this implied limitation on the reach of the injunction, it would extend to leaflet distribution. It is not in terms restricted to picketing, but bans any unconsented entry, for it prohibits "Picketing *and trespassing* upon the private property" of the shopping center (R. 20, emphasis supplied).

Yet the prohibition of leaflet distribution, which the rationale of the court below reaches as fully as peaceful picketing, cannot possibly be justified by reliance upon nonverbal elements in the means of communication. Handbilling involves no patrol and evokes no responses other than those which flow from the content of the appeal itself. *Hughes* v. *Superior Court,* 339 U.S. 460, 464-465 (distinguishing newspaper publication and "distribution of circulars" from picketing). The nonverbal elements of picketing are therefore irrelevant to the rationale adopted to support its suppression in this case. Uninvited entry by nonemployees is the basis of the decision below, and that covers persons engaged in pure speech as well as in admixed communication. The sole criterion is the identity of the speaker and the message he delivers, not the mode of his address. The First Amendment does not tolerate that suppression of the freedom to communicate.

The nub of the matter was laid bare by the California Supreme Court in upholding the right of peaceful picketing inside a shopping center at the premises

of the disfavored store. "The prohibition of the picketing would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business. The interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926, cert. denied, 380 U.S. 906. The First Amendment is on the side of free speech, and its preferred place cannot be subordinated to a naked property interest and a discredited constriction of the bounds of a labor dispute.

II. PEACEFUL PICKETING IN A LABOR DISPUTE IS WITHIN THE EXCLUSIVE REGULATORY SCOPE OF THE NATIONAL LABOR RELATIONS ACT AND THEREFORE WITHIN THE FIELD PREEMPTED BY THE NATIONAL LABOR RELATIONS BOARD WHETHER OR NOT CONDUCTED INSIDE A SHOPPING CENTER.

Constitutionality aside, the determination of the protection accorded and the restraint imposed on peaceful picketing in the context of a labor dispute is within the exclusive regulatory scope of the National Labor Relations Act and therefore within the field preempted by the National Labor Relations Board. We shall show that (1) the NLRB has exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing, and it is not divested of its sole jurisdiction because the picketing is conducted on the private but open property of a shopping center, (2) the confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated; Congress has legislated a comprehensive code governing organiza-

tional and recognition picketing; and in the congressional scheme regulating peaceful stranger picketing with particularity, the non-employee status of the pickets is irrelevant, (3) the relegation of peaceful picketing to the distant highway entrances serving all establishments within the shopping center, and the concomitant divorcement of the picketing from the immediate locale of the disfavored store, upsets the congressional reconciliation of protected primary picketing and prohibited secondary pressure, and (4) considered in its ramified entirety, therefore, peaceful picketing within a shopping center is an activity within the exclusive scope of the NLRA committed to the sole jurisdiction of the NLRB.

A. A State Court Enters the Preempted Domain of the NLRB Insofar as It Enjoins Peaceful Picketing, and the Circumstance That the Picketing Is Conducted Within a Shopping Center Does Not Empower the State Court To Act.

Section 7 of the National Labor Relations Act guarantees to employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection. . . ." Peaceful picketing publicizing a lawful position is a preeminent expression of protected activity. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 62. Thus, prohibition of secondary labor pressure carries the express reservation that nothing in that ban "shall be construed to make unlawful . . . any primary strike or primary picketing." NLRA, § 8(b)(4)(B); *Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, 498-499. Similarly, in regulating organiza-

tional and recognition picketing, Congress has with certain qualifications explicitly excepted from prohibitory reach "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization. . . ." NLRA, § 8(b)(7)(C). In the absence of the "requisite clarity" this Court refused to read into the "congressional plan" a purpose "to proscribe all peaceful consumer picketing at secondary sites" aimed at the identified product of a disfavored firm. *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63. And so, unless clearly within the restraint which the Act itself imposes, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters,* 346 U.S. 485, 500. The scrupulousness of Congress and this Court reflects "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *N.L.R.B.* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 63.

It is therefore clear that a state court enters "the pre-empted domain of the National Labor Relations Board insofar as it enjoin[s] . . . peaceful picketing. . . ." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139. The circumstance that peaceful picketing is conducted within a shopping center does not empower a state court to act. The propriety of labor activity on private property has been a persistent issue in disputes before the NLRB and its resolution " 'belongs to the usual administrative routine' of the Board." [11] In a variety of contexts private property has been required to yield

[11] *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 130.

to the statutory guaranty of protected concert.[12] "We have long passed the point where the bundle of property rights can be used arbitrarily or capriciously to restrict a worker's freedom of association or expression."[13]

Commitment of the question to initial determination by the NLRB is illustrated by that agency's court-approved rejection of a department store's claim that it could bar nonemployee organizers from soliciting union membership on a store-owned street open to the public. *Marshall Field & Co.*, 98 NLRB 88, 93, enforced as modified, 200 F. 2d 375 (C.A. 7). A large retail department store is bisected at ground level by a street owned by the store, known as Holden Court, used by the store employees and the public to enter the building (98 NLRB at 93; 200 F. 2d at 377); "It is open to the public for pedestrian use"

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[12] In enforcing an NLRB order directing the employer to permit the union to conduct an independent time study within the plant, the Court of Appeals for the Second Circuit stated that: "Nor are we persuaded that the Board's decision unduly invaded the Company's property rights. In other circumstances, the courts have not hesitated to afford union representatives access to company premises in furtherance of the Act's purposes. See *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (1946) (union granted access to company town to hold organizational meeting); *N.L.R.B.* v. *Lake Superior Corp.*, 167 F. 2d 147 (6th Cir. 1948) (union granted access to company-owned logging camp to solicit membership); *N.L.R.B.* v. *Cities Service Oil Co.*, 122 F. 2d 149 (2d Cir. 1941) (union granted access to company ship to discuss grievances with unlicensed personnel)." *Fafnir Bearing Co.* v. *N.L.R.B.*, 362 F. 2d 716, 722 (C.A. 2).

[13] *N.L.R.B.* v. *United Aircraft Corp.*, 324 F. 2d 128, 131 (C.A. 2), cert. denied, 376 U.S. 951. See also, *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29-30 (C.A. 2), enforcing as modified, 156 NLRB 233, 247-265.

(98 NLRB at 93). The Court of Appeals for the Seventh Circuit enforced the NLRB's order requiring the store to permit nonemployee organizers to use Holden Court for union solicitation. The Seventh Circuit agreed that Holden Court "does partake of the nature of a city street, even though owned by the company" (200 F. 2d at 380), and its decree ordered the store to desist from "Prohibiting union organizers from soliciting on behalf of a union in petitioner's private street, known as Holden Court, where the employees involved are on non-working time" (200 F. 2d at 382).

Commitment of the question to initial determination by the NLRB is further illustrated by relating the shopping center situation to the standard expressed by this Court in *N. L. R. B.* v. *Babcock & Wilcox,* 351 U.S. 105. An employer may refuse to permit distribution of union literature by nonemployee union organizers on a company-owned parking lot "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. Unlike a shopping center, however, "the Babcock & Wilcox parking lot was not generally open to the public." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31,* 40 Cal. Rep. 233, 394 P. 2d 921, 926. The public character of the shopping center is crucial. To prohibit peaceful picketing on otherwise open property is to hold that a "theoretical invasion" of property suffices of itself to suppress speech at the natural and effective place of its communication (*id.* at 924).

The *Babcock & Wilcox* standard supports no such result.[14]

Furthermore, banning peaceful picketing on otherwise open property implicates precisely that discrimination which the *Babcock & Wilcox* standard forbids. To permit entry into the shopping center of every element of the public except that part of the community with a labor message directed at and adverse to a store within the center is invidious. The court below justifies this discriminatory debarment on the explicit ground that the invitation to enter extends "only to those members of the public who would be potential customers and possibly would contribute to the financial success of the venture" (R. 105). Conversely, therefore, it excludes other members of the public who by peaceful picketing "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute" (*Thornhill* v. *Alabama*, 310 U.S. 88, 104). That differentiation makes the exercise of free speech the point of distinction in determining what part of the public to exclude from

[14] In a decision adopted by the NLRB in the absence of exceptions to it, an NLRB Trial Examiner aptly articulated the rationale: "Respondent's parking lot . . . was open to and used by the public as well as by its employees. In fact, it was intended primarily for public use as an adjunct to the store. Having made the parking lot available to the public, Respondent may not interfere with its employees' organizational activities by unreasonably denying access to it by union organizers." *Arlan's Dept. Store of Charleston*, Case No. 9-CA-3308, sl. op. p. 10, May 25, 1965.

property otherwise generally open. The *Babcock & Wilcox* standard bars that discrimination.[15]

Debarment from the shopping center offends the principle central to realization of the rights conferred by the NLRA. The premise of the statute is that the means and media of communication must be kept free and open. As stated in the Senate Report on Violations of Free Speech and Rights of Labor (S. Rep. No. 1150, 77th Cong., 2d Sess., Part 1, 4-5):

> The right of self-organization and collective bargaining is a complex whole, embracing the various elements of meetings, speeches, peaceful picketing, the printing and distribution of pamphlets, news and argument, all of which, however, are traceable to the fundamental liberties of expression and assembly. So compounded, the right of self-organization and collective bargaining is fundamental, being one phase of the process of free association essential to the democratic way of life.

It is the function of the NLRB to keep the channels of communication open and unobstructed, and in the discharge of that function appropriate access to property in order to reach the audience cannot "be defeated through the simple assertion . . . of a landlord's interest." *Harlan Fuel Co.*, 8 NLRB 25, 32.

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[15] A privately-owned meeting hall in a company town was ordered opened to a union upon the same terms extended to others where even-handed access to the hall had been denied the union. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226. "'It is not every interference with property rights that is within the Fifth Amendment . . . .'" *Id.* at 232; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 802, n. 8. In *Steelworkers* v. *N.L.R.B.*, 376 U.S. 492, in sustaining the contested picketing as primary and protected, this Court treated as irrelevant the fact that "the picketed gate . . . was located on property owned by New York Central Railroad and not upon property owned by the primary employer" (*id.* at 499).

The NLRB is thus not ousted of its exclusive competence to determine initially any question concerning the statutory protection enjoyed by peaceful picketing simply because the picketing is conducted on the private but open property of a shopping center. It is the NLRB's business in the first instance to accommodate a claimed collision between recourse to protected activity and the use of private property. Peaceful picketing inside a shopping center is no exception.

B. The Confinement of a Labor Dispute to an Employer and His Employees Adopts a Standard That Congress Has Repudiated, and the Nonemployee Status of the Pickets Is Irrelevant in the Scheme Congress Adopted To Regulate Peaceful Stranger Picketing.

The secondary reason by which the court below justifies the prohibition of peaceful picketing—that "the pickets were not and never have been employees of Weis" (R. 106)—likewise conflicts fundamentally with the federal scheme. Section 2(3) of the National Labor Relations Act states that the term "employee" "shall not be limited to the employees of a particular employer," and section 2(9) of the Act defines a "labor dispute" to mean any labor-affected controversy "regardless of whether the disputants stand in the proximate relation of employer and employee." "The broad definition of 'employee' . . . as well as the definition of 'labor dispute' . . . expressed the conviction of Congress 'that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.'" *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U.S. 177, 192. The retrogressive confinement of a labor dispute to an employer and his employees adopts a standard that Congress has repudiated.

When Congress in 1959 addressed itself with particularity to so-called stranger picketing, it acted with discriminate care to accommodate competing interests. Section 8(b)(7) of the Act, added in 1959, regulates organizational and recognition picketing. Congress did not prohibit such picketing but determined instead how and when it may be conducted. The picketing in this case informed the public that the disfavored store was "Non-Union" and "these employees are not receiving union wages or other union benefits" (*supra*, p. 5). This picketing is arguably either within or outside the scope of section 8(b)(7)(C). It might be construed as picketing to cause acceptance or selection of the picketing union by the store employees as their representative. In that event the picketing becomes an unfair labor practice where it has been conducted without a representation petition "being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . ." If a timely petition is filed an expedited election is conducted to determine whether or not the union is the employees' majority choice as their representative. But picketing will not be prohibited despite the failure to file a representation petition, and an expedited election will not be conducted even if a petition is timely filed, if the picketing falls within the scope of the final proviso to (C):

> Nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by another person in the course of his employment,

not to pick up, deliver or transport any goods or not to perform any services.

Furthermore, the picketing in this case would not be within the prohibitable scope of section 8(b)(7) at all if it is construed as a protest against substandard employment terms, undermining the prevailing area standards, unrelated to the attainment of an immediate organizational or recognition object.[16] A union's objective to require an employer "to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may be legitimately concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations."[17] The line which the NLRB draws in the administration of section 8(b)(7) is that, unless acquisition of representative status is a fairly immediate and tangibly realizable aim of picketing, it will not be deemed to have recognition or organization as "an object" simply because it trends in that direction. "We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and or-

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[16] *Houston Building and Construction Trades Council (Claude Everett Const. Co.)*, 136 NLRB 321.

[17] *Id.* at 323, quoting from *International Hod Carriers Union, Local No. 41 (Calumet Contractors Association)*, 133 NLRB 512. See also, *Local Union No. 741, Plumbers (Keith Riggs Plumbing and Heating Contractor)*, 137 NLRB 1125; *Deaton Truck Lines* v. *Local Union 612, Teamsters*, 314 F. 2d 418, 422 (C.A. 5).

ganization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist."[18]

It is thus apparent that to say in this case that "the pickets were not and never have been employees of Weis" is by itself not even relevant to determining the permissibility of the picketing in which they engaged. That picketing may be altogether within the protected domain; it may be subject to limited restraint; and it can be reached only in accordance with the standards and pursuant to the means prescribed by the Act. "Peaceful stranger picketing by a labor organization in the course of a labor dispute is therefore an activity subject to injunction only through the procedures authorized in the Act, and, if not so condemned, is protected by Congress against injunctive prohibition arising outside the Act." *Aetna Freight Lines* v. *Clayton*, 228 F. 2d 385, 388 (C.A. 2), cert. denied, 351 U.S. 950.

Accordingly, as this Court has held, a state court is "without jurisdiction to enjoin . . . organizational picketing, whether it . . . [be] activity protected . . . or prohibited" by the National Labor Relations Act. *Hotel Employees Union* v. *Sax Enterprises*, 358 U.S. 270.[19] In a series of *per curiam* opinions this Court

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[18] *International Hod Carriers Union, Local 840 (C.A. Blinne Constr. Co.)*, 135 NLRB 1153, 1168, n. 29. For the scope of section 8(b)(7), see generally Dunau, *Some Aspects of The Current Interpretation of Section 8(b)(7)*, 52 Geo. L. J. 220 (1964).

[19] Reversing *inter alia Fontainebleau Hotel Corp.* v. *Hotel Employees Union*, 92 So. 2d 415, 420, in which the Florida Supreme Court stated that "we hold . . . that the union as such, and as distinquished from the individual employees, may not . . . engage in picketing by use of the members of the union as pickets who are not employees of the subject employer."

has reversed judgments as intrusions upon the field preempted by the NLRB where the state court justified prohibition of peaceful picketing on the ground of the absence of an immediate employer-employee relationship between the persons engaged in picketing and the enterprise that was picketed.[20] Federal preemption of state prohibition of peaceful stranger picketing, firmly fixed even before Congress in 1959 by section 8(b)(7) addressed itself with particularity to the subject, is now beyond any possibility of doubt by reason of the specific and detailed regulation of the matter that Congress has prescribed. The 1959 amendment "goes beyond the Taft-Hartley Act to legislate a comprehensive code governing organizational strikes and picketing and draws no distinction between 'organizational' and 'recognitional' picketing. While proscribing peaceful organizational strikes in many situations, it also establishes safeguards against the Board's interference with legitimate picketing activity." *N.L.R.B.* v. *Drivers Local Union No. 639,* 362 U.S. 274, 291. However viewed, therefore, the picketing in this case

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[20] *Waxman* v. *Virginia,* 371 U.S. 374, reversing 203 Va. 257, 123 S.E. 2d 381, adhering to *Dougherty* v. *Virginia,* 199 Va. 515, 100 S.E. 2d 754, 760 (The pickets "were not and never had been employees of the establishments" picketed); *Mahon* v. *Milan Mfg. Co.,* 368 U.S. 7, reversing 240 Miss. 358, 127 So. 2d 647, 651 ("In the present case, there was no employer-employee relationship between Milan and the strikers or the pickets."); *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Co.,* 352 U.S. 987, reversing 78 Idaho 85, 298 P. 2d 375, 379 ("In the present situation the Union represented none of Newberry's employees, none desired Union representation, and none of such employees took any part in the picketing of the Newberry store"); *Pocatello Building & Construction Trades Council* v. *C. H. Elle Const. Co.,* 352 U.S. 884, reversing 77 Idaho 514, 78 Idaho 1, 297 P. 2d 519, 524 ("The Union did not represent a majority, a minority, or any of Simplot's employees").

is wholly within the ambit of the NLRA, to be protected, restricted, or prohibited exclusively by the NLRB.

C. Divorcement of the Picketing From the Immediate Locale of the Disfavored Store Within the Shopping Center, Relegating It to the Distant Highway Entrances Serving All Establishments Within the Center, Conflicts With the Accommodation That Congress Has Made Between Protected Primary Activity and Prohibited Secondary Pressure.

The court below requires that peaceful picketing aimed at the disfavored store inside the shopping center be conducted at the distant highway entrances to the center (R. 102, n. 4). This divorcement of the picketing from the immediate locale of the store conflicts with the accommodation that Congress has made between protected primary activity and prohibited secondary pressure. The result of relegating the picketing to entrances serving the entirety of the shopping center is that, despite punctilious efforts at the removed locations to confine the message to the disfavored store, customers may be dissuaded from buying and employees from working at *other* establishments inside the center because of unwitting belief that the shopping center as a whole is the object of protest, thereby unnecessarily drawing others into a controversy not their own. The picketing union, on the other hand, is not only ousted from the natural and effective place of picketing; it is also subjected to the risk that its conduct will be found to be secondary because of the entanglement of others and the unintentional failure to confine the message as nearly as possible to the disfavored store. The court below thus artificially creates a secondary situation in conflict with the adjustment that the federal scheme contemplates.

Congress sought to reconcile "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N. L. R. B.* v. *Denver Bldg. Trades Council,* 341 U.S. 675, 692. One preeminent means by which that end is achieved is to picket the primary employer at his immediate premises which he solely occupies and at which he conducts his regular business. *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667; *Steelworkers* v. *N. L. R. B.,* 376 U.S. 492, 498-500. The court below destroys the confinement of picketing to the "geographically restricted area near" the primary employer's premises "in a manner traditional in labor disputes"[21] by precluding picketing at that place and removing it instead to the distant highway entrances serving others as well as the primary employer. It therefore forces the creation of a common situs and compels recourse to the standards which prevail where the primary and neutral employers occupy the same premises and where the picketing at the shared premises is primary only "if it meets the following conditions" (*Moore Dry Dock Co.,* 92 NLRB 547, 549; *Local 761, I. U. E.* v. *N. L. R. B.,* 366 U.S. 667, 676-677):

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.

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[21] *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665, 671.

Comparatively nice refinements of time, place, and circumstances determine adherence to or departure from the standards for picketing at a common situs. On the one hand, picketing at the access to a shopping center housing many establishments obviously opens the union to the risk of a finding that "the union did not attempt to minimize the effect of its picketing, as required in a common situs case, on the operations of the neutral employers utilizing the market." *Local 761, I. U. E.* v. *N. L. R. B.*, 336 U.S. 667, 678-679; *Retail Fruit & Vegetable Clerks* (*Crystal Palace Market*), 116 NLRB 856, enforced, 249 F. 2d 591 (C.A. 9). On the other hand, if the picketing at the common situs is otherwise primary, it is of no moment that neutral employers may suffer because the picketing, though properly circumscribed, may nevertheless envelop their operations.[22] For, "however severe the impact of primary activity on neutral employers, it . . . [is] not thereby transformed into activity with a secondary objective." *National Woodwork Manufacturers Assn.* v. *N. L. R. B.*, 386 U.S. 612, 627.

The mischievous consequences of divorcing the picketing from the immediate locale of the disfavored store within the shopping center is vividly illustrated by the NLRB's decision in *Honolulu Typographical Union No. 37* (*Hawaii Press Newspapers*), 167 NLRB No. 150. A union had a dispute with a newspaper publisher; five establishments—four restaurants and a jewelry store—advertised in the papers put out by the

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[22] *Local 761, I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 673-674; *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2); *Sales Drivers* v. *N.L.R.B.*, 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972; *N.L.R.B.* v. *Local Union No. 55*, 218 F. 2d 226, 230 (C.A. 10); *Seafarers International Union* v. *N.L.R.B.*, 265 F. 2d 585, 590, 591 (C.A.D.C.).

publisher; in furtherance of its dispute with the publisher, the union sought by picketing and handbilling to persuade the customers of the five establishments to refrain from patronizing the restaurants and from buying jewelry advertised in the papers. The sole legal question which should have been presented, decided adversely to the union by the NLRB, was whether consumer picketing at the restaurants and jewelry store constituted following the struck service—advertising—and was therefore primary activity, conduct akin to following the struck product to urge discontinuance of trade in that product. *N.L.R.B.* v. *Fruit and Vegetable Packers,* 377 U.S. 58. Whatever the legality of the picketing, however, leaflet distribution at the premises of the five establishments would be clearly legal in any event, by reason of the second proviso to section 8(b)(4)(B) excepting from the ban of secondary activity "publicity, other than picketing, for the purpose of truthfully advising the public" that the establishment is advertising in a newspaper with which the union has a primary dispute. *N.L.R.B.* v. *Servette, Inc.,* 377 U.S. 46; *Great Western Broadcasting Co.* v. *N.L.R.B.,* 356 F. 2d 434 (C.A. 9).

But this fairly narrow controversy overspilled its boundaries because the five establishments operated within a shopping center consisting of fifty to sixty shops, and the police refused to permit the union representatives to enter the shopping center to picket and handbill at the premises of the five establishments. The union therefore picketed and distributed handbills to the public at the entrance to the shopping center. The pickets carried a sign which had pasted on the top the name of one of the five advertisers; the remainder of the sign stated that the named shop advertised in the

struck newspaper and requested the public not to buy the shop's products advertised in the paper. The handbills distributed in conjunction with the picketing requested the public not to patronize "this establishment."

And so the issue was joined, not simply on the narrow question whether the picketing directed at the five establishments was a permitted consumer appeal, but on the broader question as well whether the picketing and handbilling went beyond the five establishments to the entirety of the shopping center. The Trial Examiner found that the picketing was aimed at the center as a whole, and therefore illegal on that ground, observing that (TXD, sl. op. p. 9):

> At different times some 40-50 pickets, carrying signs, patrolled in front of Market Place. Each picket sign named *one* of the *five* advertisers, who were the targets of the picketing. The presence of 40-60 pickets in front of Market Place, which had 40-50 shops, at first glance suggested to the casual observer that *all* shops of Market Place were being picketed. Only if the observer watched several complete rounds of the picket line, would he discover that *five names only* were duplicated by the pickets, and thereby come to the dubious conclusion that *maybe* only *five* of the shops in Market Place were being picketed. But who, of the public or consumers, is going to take such time and care, to learn, what the handbills and the picket signs should have stated in the first place? [Emphasis in original.]

The NLRB majority agreed with the examiner's result but not with his reasoning, stating that: ". . . the picket signs were defective not because each one failed to list all the secondary employers involved, but because the picketing was directed to a total boycott of

the secondary employers" (sl. op. p. 1). The dissenting member was of the view that the picketing in its entirety was legal, observing as to the manner of its conduct that (sl. op. pp. 15-16):

> That the picketing took place at the main entrance to the entire shopping plaza in which the several establishments were located, rather than immediately before the premises of the advertising establishments, is not sufficient to support a violation in the circumstances here. The Union desired and attempted to picket at each individual establishment but was prevented from doing so by the police, and thereafter conducted the picketing as close to those establishments as was possible. Nor is there any defect in the picket signs' identification of those whose patronage the Union sought to interrupt. The establishments were named on the signs, and there was no plea to cease doing business with anyone else.

The leaflet distribution, otherwise entirely proper, was found to be illegal solely because the target of the handbill was thought to be the entirety of the shopping center rather than the five advertising establishments within it. The Trial Examiner found that (TXD sl. op. pp. 8-9):

> . . . the Union's handbill in this case did not identify only the *five* establishments who were advertisers in the struck Waikiki Beach Press. On the premises of Market Place, which is a large shopping complex, there are approximately 50 to 60 shops, restaurants, and bars. Of these only five were advertisers in the Waikiki Beach Press. However, the handbills appealed in most general terms to the public not to patronize "this establishment" which certainly included *all* the retailers in Market Place, the non-advertisers and advertisers

> alike. Certainly the handbills alone did not "truthfully" advise the public that "a product or products" were produced by an employer with whom the labor organization had a "primary dispute." These handbills, which should have specified the five advertisers, specified only "this establishment," obviously Market Place, which, in effect, untruthfully misled the public into the belief that *all* shops, bars, restaurants, etc., in Market Place and Market Place were the targets of the Union's handbilling. This type of handbill, . . . indefinite and thereby actually misleading, cannot be considered as within the protection of the proviso. [Emphasis in original.]

The NLRB majority agreed, stating that (sl. op. p. 7):

> The handbills, distributed . . . at the entrance to a shopping complex of 50 to 60 shops, requested the public not to patronize "this establishment." The reference clearly was to all the shops in International Market Place, both advertisers and non-advertisers. The handbills were therefore appealing to the public not to patronize any of the establishments. By referring only to "this establishment" and not specifying the advertisers, the handbills were misleading and therefore not "for the purpose of truthfully advising the public" within the meaning of the proviso.

The dissenting member disagreed, taking the view that this interpretation was based on a truncated version of the events. He explained that (sl. op. pp. 16-17):

> As for the handbilling, though the leaflets did not name the establishments at which they were directed, they were distributed to consumers only simultaneously with and in the immediate area of the picketing. They had originally been intended for distribution in front of the individual estab-

> lishments, but . . . the police prevented this. To hold that "this establishment" in the leaflets is readily susceptible of meaning non-advertising stores in the shopping center (and that therefore this object must be inferred) is to disregard the surrounding circumstances and treat as discrete and wholly separate the handbilling which was part and parcel of the picketing. The Union's object in the handbilling was clearly to reach only the advertisers, and this object is not unlawful.

For the purpose of the present case it of course does not make the slightest difference whether the NLRB majority, the dissenting member, or the examiner is right in *Honolulu Typographical*. The point simply is that whether the picketing and handbilling were directed at the entirety of the center, or were aimed instead at the five advertising establishments within the center, would not even have existed as a question if the activity had taken place at the premises of the five stores inside the center, where the union wanted to conduct it, rather than at the entrance serving the whole of the center, where the police removed it. This multiplication of risks for the union and true neutrals arises solely from the erection of an artificial barrier around a shopping center.

The upshot is that the court below removes the picketing from its natural primary habitat, subjects the union to the resultant risk that its picketing at shared entrances will be found to be secondary because not sufficiently circumscribed, and needlessly embroils neutral employers by exposing them to picketing in a controversy not their own. The decision below is therefore faithless to the congressional reconciliation of protected primary picketing and prohibited secondary pressure.

D. The State Court Entered the Preempted Domain of the NLRB by Enjoining Peaceful Picketing Within the Shopping Center.

The elements of the controversy thus placed its determination within the sole jurisdiction of the NLRB. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 245. Heedless of this principle, the court below "entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioner." *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139.

To resist preemption respondents urge that "Congress has not given the National Labor Relations Board any authority to enjoin or to act in any manner concerning a union's trespass to private property" (Br. in Opp. p. 18). But this formulation of the issue is question-begging. It assumes that entry into a shopping center is a state-prohibitable trespass rather than the exercise of a federally-protected right. Yet the very question the NLRB must decide is whether access to the private but open property of a shopping center is within the ambit of rights safeguarded by section 7 of the NLRA. And an affirmative determination would of course bar state derogation of the federal right. Furthermore, respondents disregard NLRB power to reach the picketing if it is organizational or recognitional in character, and concomitantly disregard the congressional determination that the picketing should be let alone if it is not in that class. It is the role of the NLRB to draw this line in the administra-

tion of section 8(b)(7). Similarly, respondents ignore the dislocation of the primary-secondary adjustment that Congress has effectuated, a disruption which necessarily flows from according primacy to respondents' claim that land ownership standing alone should be given pristine preeminence. Yet it is the function of the NLRB to reconcile divergent values none of which can be given full sway without colliding with the other.

Both in its potentially protected and prohibited aspects peaceful picketing within a shopping center is therefore a subject deeply embedded in the work that the NLRB has been commissioned to do. To divest the NLRB of its jurisdiction in the name of trespass is to assume an answer to every question that the NLRB has been established to decide. When the Board has not answered the questions, but when instead they remain unanswered, a state court has no jurisdiction to act. This has been made unmistakably clear by this Court in *Garmon* (359 U.S. at 245-246):

> "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic

> problem in *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1. In that case we held that failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

For the same reasons respondents' companion formulation of the issue—"Clearly the complained of activity in the present case 'is governable by the State or it is entirely ungoverned' " (Br. in Opp. p. 18)—is likewise question-begging. For until the NLRB holds that peaceful picketing within a shopping center is not activity protected by section 7, *and* holds that particular picketing is not organizational or recognitional activity prohibited by section 8(b)(7), *and* holds that to oust picketing from a shopping center does not upset the primary-secondary adjustment, it is not possible to state that the conduct is not within national governance. Furthermore, even were it true that the NLRB would not reach the conduct either to protect or to prohibit it, this would simply "raise the question whether such activity may be regulated by the States." *Garmon,* 359 U.S. at 245. It would not answer it. For the judgment of Congress might then well be that the

conduct should be let entirely alone. If the picketing is not specifically restrained by the NLRA, "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union,* 346 U.S. 485, 500. See *Hannah Mining Co.* v. *MEBA,* 382 U.S. 181, 188, 189.

The fallacy of respondents' use of the word "trespass" as a talisman to avoid preemption is further apparent from their citation of *Automobile Workers* v. *Wisconsin Board* (*Briggs-Stratton*), 336 US. 245, to support their thesis (Br. in Opp. p. 18). Of the latter case this Court stated in *Garmon* that the "approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (359 U.S. at 245, n. 4). As thereafter elaborated, "of special significance is the fact that the approach to pre-emption taken in *Briggs-Stratton* was that the state courts and this Court on review were required to decide whether the activities were either protected by § 7 or prohibited by § 8. This approach is 'no longer of general application,' . . . as this Court has since developed the doctrine in preemption cases that questions of interpretation of the National Labor Relations Act are generally committed in the first instance to the Board's administrative processes. . . ." *N.L.R.B.* v. *Insurance Agents' International Union,* 361 U.S. 477, 493, n. 23. It is this "now discarded approach to pre-emption" (*ibid.*) that respondents would restore.

This case is therefore squarely within settled and conventional preemption principles. *Freeman* v. *Retail Clerks Union Local No. 1207,* 58 Wash. 2d 426, 368 P. 2d 803; *Maryland* v. *Williams,* 44 LRRM 2357, 2362-64 (Md. Crim. Ct., June 10, 1959); *Weis Markets* v. *Retail Store Employees' Union, Local No. 692,* 66 LRRM 2166 (Md. Cir. Ct., August 18, 1967). "Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act. . . . If the peaceful picketing complained of in this case is such conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. . . . The issuance of the state injunction in this case tended to frustrate this federal policy. This would be true even if the picketing were prohibited conduct." *Liner* v. *Jafco,* 375 U.S. 301, 306-307.[23]

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[23] In *Hanna Mining Co.* v. *MEBA,* 382 U.S. 181, this Court found no preemption where the disputed conduct was engaged in by supervisors who are not within the coverage of the NLRA. *Hanna* is notable because of the presence in this case of every factor absent in *Hanna.* In *Hanna,* quite unlike this case, the picketing could not "be protected by § 7 of the Act, arguably or otherwise" (*id.* at 188); there could "be no breach of § 8(b)(7), curtailing organizational or recognitional picketing" (*ibid.*); the supervisory status of the employees, upon which the arguably prohibited or protected character of their activity hinged, had been settled with unclouded legal significance (*id.* at 190); and there was a minimal risk of dislocating the primary-secondary adjustment in the exertion of economic pressure (*id.* at 191-194). Every negative in *Hanna* is a positive in this case. And so, as we deal here with workers within "the regime of the Act", the "central interests served by the *Garmon* doctrine" are endangered by the state injunction; and there exists here "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered" (*id.* at 193).

III. THE DECISION OF THE STATE COURT CONFLICTS WITH FEDERALLY PROTECTED RIGHTS AND THEREFORE CANNOT STAND EVEN IF THE STATE COURT IS EMPOWERED TO ADJUDICATE THE CONTROVERSY.

But even if the court below is empowered to adjudicate the controversy, its decision conflicts with federally protected rights and therefore cannot stand. What Congress has given a State may not take away. *Nash* v. *Florida Industrial Commission*, No. 48, October Term, 1967, December 5, 1967. A "'State may not prohibit the exercise of rights which the federal Acts protect.'" *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75.

Peaceful picketing at the premises of a disfavored employer informing the public that the employer is "non-Union" and "these employees are not receiving union wages or union benefits" is concerted activity for mutual aid or protection. It does not lose its protected status because it is conducted on private property open to the public. Prohibition of the picketing on the ground that the participants in it are not employees of the disfavored employer repudiates Congress' premise that protected concerted activity extends beyond an employer and his employees. And relegation of the picketing to distant entrances shared by others results in the twin evils of destroying the right to picket at the primary employer's premises and of exposing neutral employers to picketing in a controversy not their own.

Accordingly, in prohibiting peaceful picketing safeguarded by the National Labor Relations Act, Pennsylvania by the common law formulated and enforced by its judiciary "has forbidden the exercise of rights explicitly protected by § 7 of that Act"; "a state law which denies that right cannot stand under the Su-

premacy Clause of the Constitution." *Division 1287, Amalgamated Association* v. *Missouri*, 374 U.S. 74, 83. For in an area where federal law operates and is paramount, "the inconsistent application of state law is necessarily outside the power of the State." *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 296.

CONCLUSION

For the reasons stated the judgment should be reversed and the case remanded with directions to dismiss the complaint.

Respectfully submitted,

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December 1967.

APPENDIX

Relevant Provisions of the National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, Et. Seq.)

SEC. 2. When used in this Act—

* * *

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. . . .

* * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to

* *

recognize under this Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other thon the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

• • •

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

"(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a

petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8)(b).

• • •

SUPREME COURT, U. S.

FILED

DEC 18 1967

JOHN F. DAVIS, CLERK

No. 478

In the Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., PETITIONERS

v.

LOCAL VALLEY PLAZA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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INDEX

	Page
Interest of the National Labor Relations Board	1
Statement	2
Summary of argument	5
Argument:	
The State court lacked jurisdiction to enjoin the Union's picketing	7
A. The picketing is arguably subject to the National Labor Relations Act	7
B. To subject the picketing to State court jurisdiction would entail a real danger of upsetting the Federal regulatory scheme	12
C. The situation here does not fall within the exceptions to the *Garmon* principle	16
Conclusion	18
Appendix	19

CITATIONS

Cases:

American Federation of Labor v. *Swing*, 312 U.S. 321	9
Auto Workers v. *Russell*, 356 U.S. 634	18
Centralia Bldg. & Construction Trades Council v. *National Labor Relations Board*, 363 F. 2d 699	14
District 65, Retail, Wholesale & Department Store Union, 157 NLRB 615, enforced, 375 F. 2d 745	17
Fafnir Bearing Co. v. *National Labor Relations Board*, 362 F. 2d 716	11

284-901—67——1

Cases—Continued

	Page
Garner v. *Teamsters Union*, 346 U.S. 485	10, 14
General Dynamics Telecommunications, etc., 137 NLRB 1725	12
Gimbel Brothers, 100 NLRB 870	17
Hanna Mining Co. v. *Marine Engineers*, 382 U.S. 181	17
Houston Building & Construction Trades Council (Claude Everett Construction Co.), 136 NLRB 321	8
Ineres Steamship Co. v. *Maritime Union*, 372 U.S. 24	17
Linn v. *United Plant Guard Workers*, 383 U.S. 53	17, 18
Marsh v. *Alabama*, 326 U.S. 501	16
Marshall Field & Co. v. *National Labor Relations Board*, 200 F. 2d 375	11
Meat Cutters v. *Fairlawn Meats*, 353 U.S. 20	2
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	5, 11, 12
National Labor Relations Board v. *Cities Service Oil Co.*, 122 F. 2d 149	11
National Labor Relations Board v. *Denver Building & Construction Trades Council*, 341 U.S. 675	15
National Labor Relations Board v. *Drivers Local 639 (Curtis Bros.)*, 362 U.S. 274	9
National Labor Relations Board v. *Fruit & Vegetable Packers*, 377 U.S. 58	9
National Labor Relations Board v. *Lake Superior Lumber Corp.*, 167 F. 2d 147	11
National Labor Relations Board v. *Local 3 Electrical Workers*, 362 F. 2d 232	14
National Labor Relations Board v. *Stowe Spinning Co.*, 336 U.S. 226	11

Cases—Continued

	Page
Operative Plasterers and Cement Masons', Local 44 (Penny Construction Co.), 144 NLRB 1298	14
Priced-Less Discount Foods Inc., d/b/a Payless, 162 NLRB No. 75, 64 LRRM 1065	11, 16
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	5, 10
Retail Fruit & Vegetable Clerks v. *National Labor Relations Board*, 249 F. 2d 591	15
Sailors Union of the Pacific, 92 NLRB 547	8, 14
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236	5, 6, 7, 12, 13, 16
Schwartz-Torrance Investment Corp. v. *Bakery & Confectionery Workers' Union*, 40 Cal. Rep. 233, 394 P. 2d 921, certiorari denied, 380 U.S. 906	16
Steelworkers v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492	10, 11
Weber v. *Anheuser-Busch Inc.*, 348 U.S. 468	18
Weis Markets, Inc., 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708	7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*)	15, 19
Section 7	5, 9, 16, 20
Section 8(a)(1)	10, 11, 16, 19
Section 8(a)(3)	19
Section 8(b)(1)(A)	17
Section 8(b)(2)	8, 13, 19
Section 8(b)(4)(B)	5, 8, 9, 10, 15, 20
Section 8(b)(7)(C)	5, 7, 8, 9, 10, 14
Section 10(j)	13
Section 13	9, 22

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

Certiorari was granted in this case on October 23, 1967. The basic questions presented are: (1) whether an abridgment of freedom of speech resulted from a State court's injunction, on trespass grounds, of peaceful picketing by non-employee union representatives conducted at a retail store located in a shopping center, for the purpose of informing the public of the store's non-union status; and (2) whether the State court was without jurisdiction to enjoin such picketing because the conduct is subject to regulation under the National Labor Relations Act, and thus within the exclusive primary jurisdiction of the Na-

tional Labor Relations Board.[1] Although the first question is important, we believe that there is no occasion for the Court to reach it here. For, as we shall show, the preemption issue requires reversal of the judgment below. In view of the strong interest of the National Labor Relations Board in the preemption question, we think it appropriate to limit this brief to that issue. In the Board's view, State court regulation of the kind of activity involved here would impair the uniform federal labor policy embodied in the National Labor Relations Act, and would impede the Board's administration of that policy.

STATEMENT

The underlying facts adduced in the hearing before the trial court are as follows: Logan Valley Mall is a large, new shopping center owned by Logan Valley Plaza, Inc. ("Logan") (R. 87; 41–42).[2] In December 1965, at the time of the events here involved, the shopping center had leased space to two tenants who were engaged in business there—Weis Markets, Inc. ("Weis"), which operates a supermarket for the sale of food and sundry household articles, and Sears, Roebuck & Co., which operates a department store and an automobile service station (R. 88). Other tenants were expected (R. 51).[3]

---

[1] This second question was left open in *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 24.

[2] "R." references are to the certified record on file with the Clerk of this Court.

[3] At present there are 15 additional tenants (Pet. 4, n. 2).

The shopping center is situated in Logan Township, near Altoona, Pennsylvania, at the intersection of two public highways—Plank Road to the east and Good's Lane to the south (R. 86, 87). Plank Road is a heavily traveled highway, with cars moving at high speed (R. 45). The shopping center is separated from the highways by earthen embankments unbroken except for five paved entrances (R. 88). The distance from the highway to the Weis store is 450–500 feet at entrance 5, which is located on Plank Road and is the main entrance to the shopping center (R. 39, 43, 60). Between the entrances and the Weis store there are extensive parking areas, with parking spaces and driveways demarcated on the ground. These areas constitute common parking facilities for all stores in the center. (R. 88.) The Weis facility consists of an enclosed modern market building with an open, but covered, porch running along its front, and a pick-up zone directly along the porch for loading purchased goods into customers' cars (R. 88).

On December 8, 1965, Weis opened for business, employing non-union personnel (R. 89; 28). A few days later, Weis posted a sign between its entrance and exit doors reading: "No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management" (R. 33).

Beginning on December 17, 1965, pickets, who were members of petitioner Amalgamated Food Employees Union, Local 590 ("the Union"), peacefully walked in front of the Weis store, usually in the parcel pick-up zone (R. 54–55). The pickets, who ranged in number

from four to thirteen, wore placards stating: "Weis Market is Non-Union, these employees are not receiving union wages or other union benefits. *Amalgamated Food Employees* Union Local 590" (R. 89; 29, 32). None of the pickets was employed by Weis; all were employees of neighboring supermarkets (R. 89; 66–67).

Ten days after the picketing began, Weis and Logan obtained from a State court an *ex parte* injunction prohibiting the Union, *inter alia,* from (R. 20–21): (1) picketing and trespassing on Weis's private property, including the store, the porch, and the parcel pick-up area; and (2) picketing and trespassing on Logan's private property including the parking area, and all entrances and exits leading to that area.

After a hearing, the court continued the injunction (R. 100).[4] The court held that the picketing, although peaceful, constituted a trespass under State law, since it was conducted on private property by persons who were not invitees of the property owner or his lessee (R. 94–96). The court further found that the object of the picketing was to force Weis to require its employees to become members of the Union, a purpose which was unlawful under State law (R. 96–97).

On appeal, the Supreme Court of Pennsylvania (with three Justices dissenting) affirmed, on the

[4] The court indicated that the injunction did not preclude picketing on the highway embankments (R. 98). Accordingly, after the injunction issued, picketing was conducted on the embankments adjacent to the shopping center entrances (R. 62).

ground that the picketing constituted a trespass under State law (R. 101–111).

SUMMARY OF ARGUMENT

Under this Court's decisions, when an activity is "arguably subject" to federal regulation under the National Labor Relations Act, a State court must defer to the exclusive primary jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245. It is plain that the picketing involved here is "arguably subject" to regulation under the Act. Such picketing might violate Section 8(b)(7)(C) of the Act, which bars organizational or recognitional picketing under certain conditions, or Section 8(b)(4)(B), which bars picketing directed at neutral, secondary employers. On the other hand, if the picketing were not barred by those provisions, it might well be protected by Section 7 of the Act, which safeguards the right to engage in peaceful picketing, or be within the area which Congress intended to leave to the free play of economic forces. The fact that the picketing was conducted within a shopping center on privately owned land does not remove it from the ambit of the Act. The Board is frequently required to make an accommodation between an employer's property rights and the employees' rights under Section 7 of the Act. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793; *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105.

To subject the picketing here to State court jurisdiction would entail a real danger of creating the

very conflicts and "frustration of national purposes" which *Garmon* and the other preemption decisions of this Court have sought to avoid. The trial court found that the purpose of the picketing was to force Weis to compel his employees to join the Union. The Board, on the other hand, could well have found that the picketing was conducted for a different objective, which would not violate the National Labor Relations Act. Moreover, the State court proceeded on the premise that, since the shopping center was privately owned and neither its owner nor Weis had invited the pickets onto the premises, the pickets had committed a trespass under State law. Under the National Labor Relations Act, however, these circumstances would not be decisive of the Union's right to engage in organizational or related activity on such property.

In view of the comprehensive and careful manner in which the National Labor Relations Act regulates peaceful picketing, the activity here cannot be deemed "a merely peripheral concern" (*Garmon,* 359 U.S. at 243–244) of the Act. Moreover, although a State has a legitimate interest in protecting private property against trespass, that interest must be balanced against the potential harm to the regulatory scheme established by federal labor legislation. Here the State is merely undertaking to protect against the economic injury which would normally flow from peaceful picketing in a labor dispute, and such State regulation imposes a substantial danger of interference with federal regulation. In these circumstances, the federal statute may properly be deemed to bar the application of the State's trespass law.

ARGUMENT

THE STATE COURT LACKED JURISDICTION TO ENJOIN THE UNION'S PICKETING

A. THE PICKETING IS ARGUABLY SUBJECT TO THE NATIONAL LABOR RELATIONS ACT

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that, when "an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." The picketing involved here is clearly within the ambit of the Act.[5]

Section 8(b)(7)(C) of the Act is pertinent in this regard. That provision prohibits recognitional or organizational picketing if conducted for more than 30 days without a representation petition having been filed with the Board (*infra*, pp. 20–21). Informational picketing, directed toward publicizing the employer's non-union status, is excepted from that restriction by the second proviso of Section 8(b)(7)(C), so long as no disruption of the employer's business results (*infra*, p. 21). Thus, if it were found that an object of the Union's picketing here was to obtain recognition from Weis as the representative of its employees, or to induce Weis employees to join the Union,[6] the picket-

[5] There is no question that the Board has, and would exercise, jurisdiction over Weis. See *Weis Markets, Inc.*, 116 NLRB 1993, 125 NLRB 148, 142 NLRB 708.

[6] The trial court found that the object of the picketing was to force Weis to compel his employees to join the Union (R. 96–

ing would violate Section 8(b)(7)(C) if (1) conducted for more than 30 days, (2) no representation petition were filed during that time, and (3) a stoppage of deliveries to the store resulted. On the other hand, if the picketing had no effect on deliveries and were conducted only for the purpose of informing the public of Weis's non-union status, it would be excepted from the prohibition of Section 8(b)(7)(C) by the second proviso, without regard to its duration or whether a representation petition were filed. Moreover, if the picketing were found not to be recognitional or organizational in nature, but merely to protest the failure of Weis to conform to working standards prevailing in the area, the picketing would not be within Section 8(b)(7)(C) at all. See *Houston Bldg. & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321.

Similarly, since the shopping center where the picketing was conducted had employers other than Weis, the Union was obligated to conduct its picketing with due regard for the right of those other employers who could not lawfully be embroiled in the Union's dispute with Weis. If the Union failed to do so, its picketing might be for an objective which was secondary in nature and proscribed by Section 8(b)(4)(B) of the Act (*infra*, p. 20).[7]

97). Such picketing would violate Section 8(b)(2) of the Act (see *infra*, pp. 19–20).

[7] In *Sailors' Union of the Pacific*, 92 NLRB 547, the Board laid down evidentiary guides for determining whether picketing at a common situs was primary or secondary. It ruled that the picketing would be deemed primary if (*id.* at 549):

(a) The picketing is strictly limited to times when the

On the other hand, if the picketing were not barred by Section 8(b)(7)(C) or Section 8(b)(4)(B) of the Act, there is a strong likelihood that it would either be protected by Section 7 or within the area that Congress intended to leave to the free play of economic forces. Section 7 (*infra*, p. 19) guarantees to employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection * * *." Peaceful picketing to publicize an employer's non-union status or his failure to conform to working standards prevailing in the area is a traditional form of concerted activity for mutual aid or protection.[8] Moreover, as the Court pointed out in *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58, where it concluded that Congress did not intend to proscribe all peaceful consumer picketing at the premises of employers not involved in the primary labor dispute: "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable"

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situs of dispute is located on the [common] * * * premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer. * * *

[8] "The interdependence of economic interest of all engaged in the same industry has become a commonplace." *American Federation of Labor* v. *Swing*, 312 U.S. 321, 326. See also *National Labor Relations Board* v. *Drivers, Local 639* (*Curtis Bros.*), 362 U.S. 274, 282, and Section 13 of the Act (*infra*, p. 22).

(*id.* at 62).[9] In a similar vein, the Court previously stated that the "policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters Union,* 346 U.S. 485, 499–500.

Nor is the picketing here removed from the ambit of the Act because it was conducted within a shopping center on privately-owned land instead of on a city street or sidewalk. Early in the administration of the Act, this Court recognized that the Board could make an accommodation between the employer's property rights and the employees' right to engage in organizational activity. Thus, it sustained the Board's ruling that an employer ban on union solicitation and literature distribution by employees in a plant and in the plant parking lot, during non-working time, constituted interference with organizational activity barred by Section 8(1) (now 8(a)(1)) of the Act (*infra,* p. 19). *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793. Since that time, the Board has dealt with this problem of accommoda-

[9] Indeed, the prohibition against secondary activity—Section 8(b)(4)(B)—carries the express reservation that nothing in that ban "shall be construed to make unlawful * * * any primary strike or primary picketing" (*infra,* p. 20). *Steelworkers* v. *National Labor Relations Board* (*Carrier Corp.*), 376 U.S. 492, 498–499. And, as shown (*supra,* p. 8), Section 8(b)(7)(C) specifically excepts certain picketing whose purpose is merely to publicize the Union's views.

tion of these conflicting interests in a variety of contexts.[10]

To be sure, in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court held, contrary to the Board, that the employer did not unlawfully interfere with organizational activity by refusing to permit distribution of union literature by non-employee union organizers on a company-owned parking lot. But in so ruling the Court did not hold that the Board lacked power to balance the employer's property interests against the employees' organizational rights, but merely rejected the particular ac-

[10] See, *e.g.*, *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226 (union organizer granted access to the only available meeting hall in a company town); *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147 (C.A. 6) (union organizer granted access to company-owned logging camp to solicit membership); *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. 2d 149 (C.A. 2) (union representative granted access to company ship to discuss grievances with unlicensed personnel); *Fafnir Bearing Co.* v. *National Labor Relations Board*, 362 F. 2d 716 (C.A. 2) (union representative granted access to plant to conduct an independent time study); *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 380 (C.A. 7) (union solicitation by non-employees permitted on a company-owned street connecting two company buildings, where the street was generally used by the public); *Priced-Less Discount Foods, Inc., d/b/a Payless*, 162 NLRB No. 75, 64 LRRM 1065 (employer violated Section 8(a)(1) by excluding a non-employee union solicitor from a grocery store parking lot, which was open to the public and on which other forms of solicitation by non-employees were permitted).

See also *Steelworkers* v. *National Labor Relations Board* (*Carrier Corp.*), 376 U.S. 492, 499 (primary character of picketing not affected by the fact "that the picketed gate * * * was located on property owned by New York Centeral Railroad and not upon property owned by the primary employer").

commodation made by the Board in that case.[11] Indeed, the Court recognized that, even on the private property there involved, the employer could not bar non-employee union organizers if there were a showing (absent in *Babcock*) that "reasonable efforts by the union through other available channels of communication [would not] enable it to reach the employees with its message" or that the employer had discriminated "against the union by allowing other distribution" (*id.* at 112).[12]

In short, this picketing may be either protected or prohibited by the Act, and that cannot be determined unless and until the Board has had the opportunity to pass upon the question. Under *Garmon,* therefore, the National Labor Relations Act preempts the subject matter of this suit, and the State courts had no jurisdiction to entertain it.

B. TO SUBJECT THE PICKETING TO STATE COURT JURISDICTION WOULD ENTAIL A REAL DANGER OF UPSETTING THE FEDERAL REGULATORY SCHEME

As the Court pointed out in *Garmon, supra,* the basic consideration underlying its preemption deci-

[11] There the Court stated (351 U.S. at 112):

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other * * *.

[12] See *General Dynamics Telecommunications, etc.*, 137 NLRB 1725 (employer could properly exclude non-employee union solicitors from a privately-owned road leading to the plant, where adequate opportunity existed for reaching the employees at the public road entrances to the plant and there was no showing that other solicitation had been permitted on the private road).

sions is that "Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (359 U.S. at 242). "To leave the States free to regulate conduct * * * plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law," the Court there further stated (*id.*, at 244). Nor does it matter whether the States act "through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes" (*ibid.*).

As we have shown (*supra*, pp. 9–10), protection of peaceful picketing is "plainly within the central aim of federal regulation * * *." To subject the picketing involved here to State court jurisdiction would thus entail a real danger of creating the very conflicts and "frustration of national purposes" which *Garmon* and the other preemption decisions of this Court have sought to avoid.

Here the trial court found that the purpose of the picketing was to force Weis to compel his employees to join the Union (R. 96–97). If the Board also found so, the picketing would violate Section 8(b)(2) of the Act (*infra*, p. 19), and the Board presumably would have issued a cease and desist order or sought a preliminary injunction under Section 10(j) (29 U.S.C.

160(j). See *Garner* v. *Teamsters Union*, 346 U.S. 485, 488–489. But ascertaining the objective of picketing is a difficult task involving subtle distinctions,[13] and the Board might find that here the objective was only recognitional or organizational in nature. In that event, Section 8(b)(7)(C) of the Act would apply, and the picketing would be illegal only under certain conditions (see *supra*, pp. 7–8). Moreover, if the Board found that the object was only to publicize the failure of Weis to conform to area working standards, the picketing (if it conformed to the *Sailors' Union* standards; see note 7, *supra*) would not violate the Act at all.

In short, the State court enjoined picketing which the Board might well have found would not have been unlawful under the Act. Moreover, the court, by prohibiting picketing in the vicinity of the Weis store

[13] The trial court stressed the fact that handbills accompanying the picketing called upon shoppers "Not To Patronize" Weis (R. 97–98). Whether the Board would have drawn the same inference from the handbills, or from the picket signs themselves, which merely stated that Weis was "Non-Union" and that its "employees are not receiving union wages or other union benefits" (R. 89), is doubtful. Moreover, the legend on the signs or the handbills is not necessarily decisive; the Board looks to the total circumstances. See *Operative Plasterers' & Cement Masons', Local 44 (Penny Construction Co.)*, 144 NLRB 1298, 1300; *Centralia Bldg. & Construction Trades Council* v. *National Labor Relations Board*, 363 F. 2d 699, 701 (C.A. D.C.); *National Labor Relations Board* v. *Local 3, Electrical Workers*, 362 F. 2d 232, 235–236 (C.A. 2). In upholding the lower court, the Pennsylvania Supreme Court did not ground its decision on the unlawfulness of the picketing as a matter of labor law, which the trial court had specifically found; the reviewing court found it unnecessary to pass on that question (R. 111).

within the shopping center and requiring that the pickets move to the edge of the highway (R. 98), made it more likely that the picketing would affect the other, neutral employers at the shopping center. This result is contrary to the congressional policy, reflected in Section 8(b)(4)(B) of the Act, "of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. See *Retail Fruit & Vegetable Clerks* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

The action of the State court conflicts with the Act in other respects as well. In enjoining the picketing, the alternative ground of the trial court (and the basis on which the Supreme Court of Pennsylvania affirmed) was that, since the shopping center was privately owned and neither the owner of the center nor Weis had invited the pickets (who were nonemployees of Weis and thus "strangers") onto the premises, the pickets had committed a trespass under State law (R. 92, 95–96, 104–106). Under the Act, however, the facts that the picketing was on private property and that the pickets were not invitees would not be decisive of the union's right to conduct organizational or related activity on that property. As we have shown (*supra*, pp. 10–12), the Board would be required to balance the property rights involved against the employee rights involved. In making that accommodation, it would be relevant to consider such factors as the extent to which the property was open to members of the public and to other forms of solicitation,

and the availability of other channels through which the Union could communicate its message. Cf. *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers' Union,* 40 Cal. Rep. 233, 394 P. 2d 921, certiorari denied, 380 U.S. 906.[14] Upon a consideration of these factors, the Board could well have concluded that, notwithstanding the private ownership of the shopping center, Section 7 of the Act gave the Union representatives the right to engage in peaceful picketing there. Indeed, had Weis physically ejected the pickets, the Board might have found that such action violated Section 8(a)(1) of the Act. See *Payless, supra,* discussed in note 10, *supra.*

For these reasons here, no less than in *Garmon, supra,* a potential interference with the federal regulatory scheme can be avoided only by requiring that the State court defer to the exclusive primary jurisdiction of the Board.

C. THE SITUATION HERE DOES NOT FALL WITHIN THE EXCEPTIONS TO THE *GARMON* PRINCIPLE

In *Garmon, supra,* the Court recognized that "due regard for the presuppositions of our embracing federal system * * * has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * * [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that,

[14] In *Marsh* v. *Alabama,* 326 U.S. 501; 506, this Court noted: "The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act" (359 U.S. at 243–244). See also *Linn* v. *United Plant Guard Workers*, 383 U.S. 53. In view, however, of the comprehensive and careful manner in which the Act regulates peaceful picketing, it can hardly be contended that the activity here involved constitutes "a merely peripheral concern" of the Act. Moreover, although a State has a legitimate interest in protecting private property against trespass, the interest of the State must be balanced against the potential harm to the regulatory scheme established by the Act.

Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. The interest of the State in providing a remedy for that conduct is so great and the danger of interference with the federal regulatory scheme is so slight [15] that the State would not be barred from acting, notwithstanding that a federal remedy might also be available.[16] On the other hand, here the State is not undertaking to protect its citizens against unwanted intruders in the customary sense, but only against the economic injury which would normally flow from peaceful picketing in a

[15] Cf. *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181, 190, 193; *Incres Steamship Co.* v. *Maritime Union*, 372 U.S. 24, 27.

[16] Such conduct would appear to violate Section 8(b)(1)(A) of the Act. See *Gimbel Bros.*, 100 NLRB 870, 876; *District 65, Retail, Wholesale & Department Store Union*, 157 NLRB 615, enforced, 375 F. 2d 745 (C.A. 2).

labor dispute,"[11] and State regulation plainly imposes a substantial danger of interference with the federal scheme. Accordingly, just as in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, where the State was precluded from applying its antitrust laws to the union activity there involved, so here the State may not apply its trespass laws to the Union's picketing, consistent with federal regulation of labor matters and this Court's preemption decisions.

CONCLUSION

For these reasons, the judgment of the Supreme Court of Pennsylvania should be reversed, and the case should be remanded with directions to vacate the injunction and dismiss the complaint because of lack of jurisdiction over the subject matter.

Respectfully submitted.

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December 1967.

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[11] Cf. *Linn* v. *Plant Guard Workers*, *supra*, 383 U.S. at 64: "'The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy * * *'" (quoting from the dissenting opinion in *Auto Workers* v. *Russell*, 356 U.S. 634, 649).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership

in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the

employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subpargraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590,
Et Al., Petitioners,

v.

LOGAN VALLEY PLAZA, INC.
AND WEIS MARKETS, INC.

On a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF RETAIL CLERKS INTERNATIONAL ASSOCIATION AS AMICUS CURIAE

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INDEX

	Page
I. Interest Of The Retail Clerks International Association In This Proceeding	1
II. The Economic Use And Importance Of The Contemporary Shopping Center Vest It With A Quasi-Public Character	4
III. The Use Of Trespass Laws To Limit Free Speech And To Circumscribe Activities Protected By Federal Law On Shopping Center Property Is Contrary To Decisions Of This Court And To Modern Industrial Realities	8
Conclusion	12

AUTHORITIES CITED

Cases:

Adderly v. Florida, ... U.S. ....., 87 S.Ct. 242	10
Amalgamated Clothing Workers v. Wonderland Shopping Center, 50 LRRM 2160 (Mich. Cir. Ct.), affirmed, 122 N.W.2d 785 (Mich.)	6
Amalgamated Food Employees Union v. Logan Valley Plaza, 227 A.2d 874 (Pa.)	4
Arlan's Dept. Store of Charleston (Retail Clerks), NLRB Case No. 9-CA-3308	2, 9
Brown v. Board of Education, 347 U.S. 483	12
Freeman v. Retail Clerks, 363 P.2d 803 (Wash.)	2, 5
Green v. Retail Store Employees, 49 LRRM 3059 (Pa.Ct.Cm.Pls.)	3, 9
Hague v. CIO, 307 U.S. 496	8
Illinois v. Goduto, 211 Ill.2d 605, 174 N.E.2d 385, cert. denied 368 U.S. 927	3, 9
Illinois v. Mazo, 44 LRRM 2881 (Ill.Cir.Ct.)	3
Laburnum Construction Co. v. Construction Workers, 347 U.S. 656	11
Market Basket, 144 NLRB 1462	9
Marsh v. Alabama, 326 U.S. 501	10
Martin v. City of Struthers, 319 U.S. 141	9
Maryland v. Williams, 44 LRRM 2357 (Baltimore City Crim. Ct., Md.)	3

	Page
Moreland Corp. v. Retail Store Employees, 144 N.W.2d 876 (Wis.)	3
NLRB v. Fruit and Vegetable Packers, 377 U.S. 58	9
Nahas v. Retail Clerks, 301 P.2d 932, 302 P.2d 829 (Calif. Dist. Ct. App.)	3
Retail Fruit and Vegetable Clerks (Crystal Palace Market), 116 NLRB 856, enforced 249 F.2d 591 (C.A. 9)	3
Schneider v. State, 308 U.S. 147	8
Schwartz-Torrance Investment Corp. v. Bakery Workers, 394 P.2d 921 (Calif.), cert. denied 380 U.S. 906	8, 11
Thornhill v. Alabama, 310 U.S. 88	10, 11
STATUTES:	
National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, et seq.)	12
MISCELLANEOUS:	
Bornstein, Organizational Picketing in American Law, 46 Ky. L.J. 25 (1957)	8
Chain Store Age, January 1966	7
Feinberg, From Where I Sit, Woman's Wear Daily, August 22, 1967	5
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Kaylin, A Profile of the Shopping Center Industry, Chain Store Age, May 1966	6
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Slom, Urban Shopping Centers On Rise, Home Furnishings Daily, March 18, 1966	7
Webster, Third New International Dictionary, p. 2101 (1961 ed.)	1

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BRIEF OF RETAIL CLERKS INTERNATIONAL ASSOCIATION AS AMICUS CURIAE

I. Interest Of The Retail Clerks International Association In This Proceeding.

The Retail Clerks International Association (hereinafter, the "RCIA") is an international, parent labor union which represents in excess of one-half million members for purposes of collective bargaining in the United States and Canada. Virtually all of them are employed in the retail industry.

The RCIA estimates that it represents more than 200,000 employees who work in stores located in "shopping centers"[1] in the United States. The kinds of retail establish-

[1] A "shopping center" is a phrase of art. One definition is "a concentration of retail stores and service establishments in a suburban area usually with generous parking space and usually planned to serve a community or neighborhood." Webster, Third New International Dictionary, p. 2101 (1961 ed.). *(Continued p. 2)*

ments in which they are employed include food stores, general merchandise department stores, "5 & 10¢" ("variety") stores, drug stores, "discount" stores, clothing stores, shoe stores, book stores, bakery shops, automotive centers and many others.

Because the RCIA currently represents thousands of persons who work in shopping centers, it has a daily problem of securing access to these centers in order to perform its statutory functions to meet with, counsel, and represent employees for purposes of collective bargaining with their employers, to negotiate and administer collective bargaining contracts, and on behalf of employees to engage in strikes, picketing and other concerted activities.[2]

(Continued from p. 1)

There are three or four generally accepted categories of shopping centers, variously defined. See, e.g., R. Myers, Suburban Shopping Centers 1 (U.S. Small Business Bulletin No. 27, U.S. Small Business Administration, 1963); who defines the main categories as follows:

> "The term 'suburban shopping center' . . . is defined as a group of retail stores and service establishments occupying a center in a suburban location that is planned, developed, and promoted as a unit. Neighborhood centers are usually composed of 10-15 stores and service shops selling predominantly convenience goods; such centers need about 1,000 families in their trading areas to support them. Community shopping centers are usually comprised of 15-35 stores and offer some shopping goods as well as convenience goods; they usually have a junior department store, shoe stores, and stores stocking men's furnishings and children's wear. They need about 5,000 families to support them. Regional shopping centers usually have 50-100 business establishments, one or more of which are department store branches. These generally have at least 100,000 people in their trading area."

[2] The RCIA has been a party to a majority of the cases involving the issue of whether labor organizations have a constitutional as well as a federally guaranteed statutory right to communicate with employees on privately owned shopping center property. See e.g., Arlan's Dept. Store of Charleston (Retail Clerks), Case No. 9-CA-3308 (1965); Freeman v. Retail Clerks, 363 P.2d 803 (Wash.

(Continued p. 3)

The RCIA's concern about this problem goes beyond its duty to act as collective bargaining agent for its members who presently work in shopping centers. It is also concerned about the right of *unorganized* workers in shopping centers to receive information from unions about collective bargaining and their federally guaranteed right to engage in self-organization and concerted activities. During the calendar year 1966, the RCIA estimates that it conducted more than 300 organizing campaigns in the United States which involved unorganized employees in shopping centers. Over the last decade, the number of organizing campaigns conducted by the RCIA in shopping centers has risen steeply.

There were 8.140 million non-supervisory employees in the retail industry in 1964. Employment and Earnings Statistics for the United States, 1909-1965, p. 611 (U.S. Dept. of Labor Bulletin No. 1312-3, 1965). Some four million unorganized employees are estimated by the RCIA to be within its jurisdiction, a high percentage of whom work in shopping centers. The Court's decision in this case will meaningfully decide whether these workers are to be insulated from the opportunity to choose to be represented for purposes of collective bargaining with their employers.

In this brief we shall not attempt to state the substantive arguments contained in petitioners' brief which show that access to privately-owned shopping centers to communicate facts concerning a labor dispute is guaranteed by the First

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(Continued from p. 2)

1961); Green v. Retail Store Employees, 49 LRRM 3059 (Pa.Ct. Cm.Pls. 1961); Illinois v. Goduto, 211 Ill.2d 605, 174 N.E.2d 385 (1961), cert. denied 368 U.S. 927 (1961); Illinois v. Mazo, 44 LRRM 2881 (Ill. Cir. Ct. 1959); Maryland v. Williams, 44 LRRM 2357 (Baltimore City Crim. Ct., Md. 1959); Moreland Corp. v. Retail Store Employees, 144 N.W.2d 876 (Wis. 1962); Nahas v. Retail Clerks, 301 P.2d 932, 302 P.2d 829 (Calif. Dist. Ct. App. 1956); and Retail Fruit & Vegetable Clerks (Crystal Palace Market), 116 NLRB 856 (1956), enforced 249 F.2d 591 (C.A. 9 1957).

and Fourteenth Amendments of the Constitution. Neither shall we attempt to state the well-made arguments of petitioners' brief that the subject matter of union activities on privately-owned shopping center property has been preempted from state court jurisdiction by Congress' comprehensive regulation of labor relations in interstate commerce. With those arguments we are in full accord.

This brief will be limited to two points. First, in the last decade shopping centers have become a major mode of economic behavior in the retail industry; they are growing in size, number and importance, and by 1975, they will dominate all other forms of retail organization; increasingly, they are taking on the characteristics and functions of public squares in the familiar shopping districts of the past. Second, the claim of unions to access to privately-owned shopping centers is a realistic claim rooted in the economic exigencies of our time, a claim which is entitled to priority under contemporary constitutional and statutory standards. The claim of shopping center owners to exclude employees and unions as trespassers is a hyper-technical claim rooted in feudal concepts of property rights designed to protect the integrity of home and person, a claim which bears no realistic relationship to the property owner's full commercial enjoyment of his property.

II. The Economic Use and Importance Of the Contemporary Shopping Center Vest It with A Quasi-Public Character.

Justice Cohen of the Pennsylvania Supreme Court commented in his dissent below that the law has always "recognized the principle that even owners of private property must observe and conform to certain community standards in the use and maintenance of their land, as witness the law of nuisance, zoning and negligence of property owners, . . . most especially, as witness the law of labor relations." *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 227 A.2d 874, 878 (Pa. 1967). In weighing the

competing claims of employees and unions for access to the streets and sidewalks of shopping centers against the claims of center owners and tenants to exclusive control of center property, the touchstone of analysis must be the economic use of shopping center property. A modern shopping center is not after all "a forty-acre pasture for contented cows,"[3] but a complex, emerging economic phenomenon involving new uses of private land for commercial and public purposes, the "most significant development in retailing since . . . the supermarket."[4]

In 1949 there were 75 shopping centers in the United States, but by 1961 *new* shopping centers were opening at the rate of about 1,000 each year.[5] By the end of 1966 there were 10,512 shopping centers,[6] and it has been estimated that there will be 25,000 by the end of 1977.[7]

Shopping centers vary in size. The shopping center in the instant case has 17 stores (Pet. for Cert. 4, n. 2), may be entered only from busy public highways (R. 45, 50, 86-88), and its perimeter spans 1.1 miles (R. 86). Many shopping centers have paved streets, traffic signs and traffic lights, sidewalks and the other characteristics of public-owned shopping streets.[8]

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[3] Freeman v. Retail Clerks, 363 P.2d 803, 807 (Wash. 1961) (concerning opinion).

[4] R. Myers, Suburban Shopping Centers 1 (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963).

At Tyson's Corner in Fairfax County, Virginia, newspaper accounts have reported that a gigantic shopping center is being erected which will include both office and apartment buildings as part of a single, self-contained community. This is doubtless the economic wave of the future.

[5] Ibid.

[6] National Research Bureau, 9 Directory of Shopping Centers in the U.S. and Canada (1967).

[7] Feinberg, From Where I Sit, Women's Wear Daily, Aug. 22, 1967.

[8] For a recent study of the size of shopping centers in terms of

(Continued p. 6)

A typical shopping center was described in a recent case. *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 50 LRRM 2160, 2161 (Mich. Cir. Ct. 1962), *affirmed by equally divided court* 122 N.W.2d 785 (Mich. 1963):

> "It is a large shopping center, approximately four blocks square, consisting of 55 acres. Defendants lease to over 60 different tenants, including a large store operated by Montgomery-Ward Company. A parking lot is maintained to park approximately 5500 American-made automobiles. . . . On occasion it has been estimated that over 60,000 people from Livonia and adjacent areas have visited the shopping center in a single day."

Shopping centers have been growing not only in number and size, but also in their share of the sales in the retail industry. In 1966, it was estimated that shopping centers accounted for $78.7 billion in annual sales, equal to 36.84% of the total retail trade in the United States and Canada. Between 1964 and 1966 shopping centers increased their share of total retail sales by more than 2% per year. By 1970, assuming the present growth rate, shopping centers will account for more than 45% of the total retail sales in this country.[9]

In a number of States shopping centers have already become the principal method of retailing. In 1964 sales in shopping centers accounted for more than 50% of all retail sales in Arizona, Colorado, Delaware, Florida, Nevada and Texas; more than 40% of all retail sales in Hawaii, Ohio and Oklahoma; and more than 35% of all retail sales in California, Connecticut, New Mexico and Oregon.[10]

(Continued from p. 5)

"gross leasable area," which is smaller than total acreage, see Kaylin, A Profile of the Shopping Center Industry, Chain Store Age E 17 (May, 1966). He observes that the larger centers are increasing their share of all shopping center sales.

[9] Ibid.

[10] Id. at E 18.

There were 944 shopping centers in California alone in 1965, which contained 22,700 individual retail stores, covered 15,405 acres of land, and had parking space to accommodate 836,040 automobiles.[11]

A further indicator of the economic importance of shopping centers is the number of new chain store branches which are being located in shopping centers. In 1965 some 9,330 new chain stores were opened. The industry reported that 59.5% of them (5,550 stores) were opened in shopping centers. Certain kinds of chains are locating new units in shopping centers at an even more dramatic rate. For example, in 1964 variety store chains opened nearly 94% of all new units in shopping centers; drug chains opened 75% of their new units in shopping centers; and shoe store chains opened 90% of their new units in shopping centers.[12]

Shopping centers have not only spread out, but they are building up. There is "a definite trend toward multi-level shopping centers with the future centers moving toward three rather than two levels."[13]

Shopping centers today are more than mere combinations of single retail stores on private acreage. In order to attract and to hold customers, they have facilities which make them centers for recreation and community functions as well. Professor Robert H. Myers of Miami University has related:[14]

> "Shopping center managements are adding to the image of their businesses as community centers by providing such things as meeting rooms, amusement

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[11] Id. at E 19.

[12] Chain Store Age, Jan. 1966, E 28.

[13] Slom, Urban Shopping Centers On Rise, Home Furnishings Daily, pp. 1-2, March 18, 1966.

[14] R. Myers, Suburban Shopping Centers 2 (Small Business Bulletin No. 27, U.S. Small Business Administration, 1963):

"'In a survey of shopping center customers made in Cincinnati in 1962, it was found that 45 percent of them had not been downtown to shop in over 6 months.'' Id. at 1.

parks, movie theaters, bowling alleys and assembly halls. Centerwide events such as art exhibits, flower shows, fashion events and symphony concerts as well as promotions more specifically identified with merchandise offerings are being utilized increasingly by shopping centers to identify these centers with their communities and to give more people in their trading areas more reason for coming to the centers."

III. The Use of Trespass Laws to Limit Free Speech and to Circumscribe Activities Protected by Federal Law on Shopping Center Property is Contrary to Decisions of This Court and to Modern Industrial Realities.

The court below restrained peaceful communication of the facts of a labor dispute at the situs of that dispute, contrary to this Court's declaration that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U.S. 147, 161; *Hague* v. *CIO*, 307 U.S. 496, 515, 516. As the California Supreme Court recently said, "The prohibition of the picketing [on shopping center property] would in substance deprive the union of the opportunity to conduct its picketing at the most effective point of persuasion: the place of the involved business." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers*, 394 P.2d. 921 (Calif. 1964), cert. denied 380 U.S. 906. Employees and unions seek to communicate with their fellow workers and the public in front of the involved employer's premises for reasons that are not only historical;[15] it is also based on the reality that other methods of communication—newspaper, radio and television—are usually too expensive and too diffuse.[16] Moreover, this union and many

[15] See Bornstein, Organizational Picketing in American Law, 45 Ky. L.J. 25 (1957).

[16] See Forkosch, Informational, Representational and Organizational Picketing, 6 Lab.L.J. 843, 861 (1955). Professor Forkosch says: "The real question is not whether any alternative exists,

(Continued p. 9)

others have been turned down as advertisers of the facts about labor disputes by newspapers, radio and television stations.

In contemporary labor relations in the United States, employees and unions seeks access to privately-owned shopping center property in several major kinds of labor relations situations: 1) Initial efforts to communicate with employees;[17] 2) Communication with employees during the course of organizing campaigns;[18] 3) Administering collective bargaining agreements;[19] 4) During economic strikes;[20] 5) During unfair labor practice strikes;[21] 6) During disputes involving second employers which involve employers located in shopping centers;[22] 7) Consumer boycotts against employers or products.[23] In these situations, employees and unions seek to communicate with fellow employees and the consuming public, the only economic groups of people who enter shopping centers. Thus, denying employees and unions access to shopping centers to convey the facts of a labor dispute would deprive employees and unions of the only suitable place to communicate facts to the only people who would be interested in those facts.[24]

(Continued from p. 8)

but whether an effective and available alternative is found. For example, even if financially available, a newspaper may be published outside the locality involved and not be read by many of the workers, so that it is not an effective alternative to disseminate information at the plant."

[17] The instant case is typical.

[18] See, e.g., Illinois v. Goduto, 211 Ill.2d 605 (1959), cert. denied 368 U.S. 927 (1961).

[19] See, e.g., Market Basket, 144 NLRB 1462 (1963).

[20] See Green v. Retail Store Employees, 49 LRRM 3059 (Pa. Ct. Cm. Pls. 1961).

[21] See, e.g., Arlan's Dept. Store of Charleston, NLRB Case No. 9-CA-3308 (1965).

[22] See NLRB v. Fruit and Vegetable Packers, 377 U.S. 58 (1964).

[23] Ibid.

[24] The right to communicate a message is not only the speaker's but just as significantly the right of the interested citizen "to receive it." Martin v. City of Struthers, 319 U.S. 141, 143, (1943).

In the present case, as in virtually all other shopping center trespass cases, the owners and tenants of shopping centers have contended that their common law right of possession entitles them to exclude any person who is not a business invitee. But "this abstract proposition gets us nowhere." *Adderly* v. *Florida*, ... U.S. ....., 87 S.Ct. 242,245 (1966).

The property owner's claim of exclusive right to control the use of his premises is historically rooted in property concepts of rural, feudal societies, concepts closely identified with the sanctity of the home and person. If employees and unions sought access to the front lawns of the homes of shopping center owners, historical notions of the sanctity of privately owned property would be relevant. But the claim of employees and unions for access to the streets and sidewalks of vast commercial shopping centers arises from the economic "circumstances of our times." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). The notion of a number of stores, combined in a single economic complex situated on a large tract of privately-owned land, was unknown before World War II. It is a phenomenon of the last two decades; it is the counterpart to the "company town" of the early decades of this century. Faced with identical contentions by property owners in the Court's noted "company town" case, Justice Black, speaking for the Court said, *Marsh* v. *Alabama*, 326 U.S. 501, 506 (1946):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793."

The shopping center owners' claim to absolute control and possession is hyper-technical, not real. Neither here nor in the dozens of other shopping center cases decided by the state courts has there been any serious contention that "a clear and present danger of destruction of life or prop-

erty, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities" of employees or union agents on shopping center property. *Thornhill* v. *Alabama,* 310 U.S. 88, 105 (1940). Certainly it is not contended by the petitioner nor by this *amicus curiae* that unions have a constitutional or statutory right to interfere with employees, customers or others who choose to enter shopping center premises.[25]

The real claim of the property owner in this case is his claim to be free from a message which he does not like. This claim "lies in the shadow cast by a property right worn thin by the public usage." *Schwartz-Torrance Investment Corp.* v. *Bakery Workers,* 394 P.2d 921, 926 (Calif. 1964), cert. denied 380 U.S. 906. The shopping center owner, in other words, really seeks to regulate union activity, not to protect private property, for he has no immediate, legitimate business need to protect—except insulation from concerted activities of employees and unions. In this sense, he seeks a special immunity from the rules of peaceful labor disputes which apply to all other retail employers whose premises are located on public streets.

The claim of employees and unions is real, not technical. If they were required to picket or to distribute handbills outside the premises of the shopping center, they would suffer the following disabilities: 1. They would be removed both in time and in distance from the premises of the employer with whom they have a dispute, and as a consequence their message would be diluted. 2. They would run the risk of injuring innocent, secondary employers in the shopping center with whom they have no dispute. 3. They would subject themselves to secondary boycott charges before the National Labor Relations Board. 4. They would

[25] Many decisions of this Court sustain state court jurisdiction to protect employers from violations of the peace and from interference with the normal conduct of their business affairs. See e.g., Laburnum Construction Co. v. Construction Workers, 347 U.S. 656 (1954).

subject themselves to private suits for secondary boycott damages in acts brought under Section 303 of the National Labor Relations Act, as amended, 29 U.S.C. § 303. 5. They would subject themselves to the risk of harm from traffic if they were required to picket on busy, modern, suburban highways.

Today's shopping center is fast replacing the familiar shopping districts of the city center. The mobility of the citizenry resulting from the mass production of automobiles and the concomitant proliferation of the suburbs are, for better or worse, changing the physical face of America. The irreversible movement of our population to the suburbs and their shopping centers dictates that the law apply contemporary standards to community institutions. "In approaching this problem, we cannot turn the clock back to 1868," when the shopping center was unknown, but we "must consider" this problem "in the light of its full development and its present place in American life throughout the Nation." *Brown* v. *Board of Education*, 347 U.S. 483, 492-493 (1954).

Conclusion

For the reasons stated here and in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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December, 1967

DEC 14 1967 SUPREME COURT, U. S.

NO. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL, *Petitioners*,

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INDEX

	Page
Motion	v
Interest of the AFL-CIO	v
Issue Not Covered by the Petitioner	vi
Conclusion	vi
Brief	1
Argument	2
The First and Fourteenth Amendments to the Constitution of the United States Prohibit The Utilization Of State Tresspass Laws To Suppress Otherwise Protected Peaceful Picketing Which Takes Place On a Privately Owned Thoroughfare Open To The Public	
Conclusion	18

Citations

CASES:

AFL v. *Swing*, 312 U.S. 321 (1941)	16
Bakery Drivers Local 802 v. *Wohl*, 315 U.S. 769 (1942)	16
Building Service Employees Local 262 v. *Gazzam*, 339 U.S. 532 (1950)	14, 16
Cafeteria Employees Local 302 v. *Angelos*, 320 U.S. 293 (1943)	16
Carpenters Local 213 v. *Ritter's Cafe*, 315 U.S. 722 (1942)	14, 15
Dennis v. *United States*, 341 U.S. 494 (1951)	12, 13
Fox v. *Washington*, 236 U.S. 273 (1915)	13
Garner v. *Teamsters*, 346 U.S. 485 (1954)	4

Page

Giboney v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1942) 13, 14

Hague v. *CIO*, 307 U.S. 496 (1939) 5, 8, 9, 17

Hill v. *Florida*, 325 U.S. 538 (1945) 2

Hughes v. *Superior Court*, 339 U.S. 460 (1950) 15

IBEW Local 501 v. *National Labor Relations Board*, 341 U.S. 694 (1951) 15

Jamison v. *Texas*, 318 U.S. 412 (1943) 6, 8, 9, 10, 17

Kermarec v. *Compagne Generale Transatlantique*, 358 U.S. 625 (1958) 7

Lamont v. *Postmaster General*, 381 U.S. 301 (1965) 7

Lovell v. *Griffin*, 303 U.S. 444 (1938) 5, 6

Marsh v. *Alabama*, 326 U.S. 501 (1946) .. 8, 9, 10, 11, 17

Marshall Field & Co., 98 *NLRB* 88 (1952) *enforced as modified* 200 F.2d 375 (7th Cir., 1953) 3, 4

Mine Workers v. *Illinois Bar Association*, —U.S.—, 36 U.S. Law Week 4048 (December 5, 1967) 17

Nash v. *Florida Industrial Commission*, —U.S.—, 36 U.S. Law Week 4046 (December 5, 1967) 2

National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) 3, 4

National Labor Relations Board v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951) 15, 16

National Labor Relations Board v. *United Aircraft Corp.*, 324 F.2d 128 (2nd Cir., 1963) *certiorari denied* 376 U.S. 951 3

New York Times v. *Sullivan*, 376 U.S. 254 (1964) .. 7

Plumbers Local 10 v. *Graham*, 345 U.S. 192 (1953) 14, 16

Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793 (1945) 3, 4

Page

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) ..... vi, 3, 4
Schenck v. *United States*, 249 U.S. 47 (1919) 12
Schneider v. *State (Town of Irvington)*, 308 U.S. 147 (1939) 5, 6, 7, 8, 9, 17
Talley v. *California*, 362 U.S. 60 (1960) 7
Teamsters Local 309 v. *Hanke*, 339 U.S. 470 (1950) . 15
Teamsters Local 795 v. *Newell*, 356 U.S. 341 (1957) *reversing per curiam* 181 Kan. 898, 317 P.2d 817 .. 16
Teamsters Local 695 v. *Vogt*, 354 U.S. 284 (1957) . 14, 15
Thomas v. *Collins*, 323 U.S. 516, 530 (1945) 16
Thornhill v. *Alabama*, 310 U.S. 88 (1939) 11, 12, 16
Yates v. *United States*, 354 U.S. 298 (1957) 13

MISCELLANEOUS:

Cox, Strikes, Picketing and The Constitution, 4 Vand. L. Rev. 475 (1961) 15
F. E. Jones, *Free Speech: Pickets on the Grass, Alas!—Amidst Confusion, A Consistent Principle*, 29 So. Calif. L. Rev. 137 (1956) 12, 13
E. A. Jones, *The Right to Picket—Twilight Zone of th Constitution*, 102 Univ. Pa. L. Rev. 995 (1954) ..13
United States Supreme Court Rule 42 v

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LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Petitioners has been obtained. Counsel for the Respondents has refused his consent.[1]

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-nine affiliated labor organizations with a total membership of approximately fourteen million.

[1]The American Retail Federation has received the consent of both the Petitioners and the Respondents, to file a brief in support of the Respondents.

The questions presented in the instant case are of great importance to the continued vitality of the right to picket, one of the handfull of basic rights that employees have at their disposal during a labor dispute. Briefly stated, these questions are whether a State may utilize its trespass laws to prohibit peaceful picketing addressed to the public, which takes place on a thoroughfare open to the public but within a privately-owned shopping center, without running afoul of the First and Fourteenth Amendments to the Constitution of the United States, the Supremacy Clause, or the preemption doctrine enunciated in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959).

As the *amicus* brief of the Retail Clerks International Association AFL-CIO demonstrates a substantial portion of retail sales take place at shopping centers and their percentage of the total market is on the increase. Thus, the decision of the court below, if sustained, could have a crippling effect on a number of the AFL-CIO's affiliates since it insulates an employer on shopping centers from effective peaceful picketing during a primary labor dispute involving him. For this reason the Federation requests this opportunity to present its views on the instant case to this Court.

ISSUE NOT COVERED BY THE PETITIONERS

In their briet in opposition to the petition, the Respondents argued that picketing, as opposed to handbilling, which seeks to inform the public that a store is non-union, does not enjoy the full protection of the First Amendment (Br. in Op. 21-23). The petitioners have dealt with this contention in their brief but in summary form. The main burden of our *amicus* brief is therefore devoted to a full exploration of this point.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Petitioners.

Respectfully submitted,

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LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out at pp. 2-3, 57-60 of The Petitioners' brief.

The interest of the AFL-CIO is set out at pp. v-vi of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE UTILIZATION OF STATE TRESPASS LAWS TO SUPPRESS OTHERWISE PROTECTED PEACEFUL PICKETING WHICH TAKES PLACE ON A PRIVATELY OWNED THOROUGHFARE OPEN TO THE PUBLIC

In the instant case the Pennsylvania courts have used the State's trespass laws to create a *cordon sanitaire* around the place of business of an employer subject to the National Labor Relations Act, 61 Stat. 136, 73 Stat 514, 29 U.S.C. 151 *et seq.* which immunizes that employer from peaceful picketing and handbilling, on thoroughfares which are within the protected area and are otherwise open to the public, designed to inform the public of the Union's position in a labor dispute with him.[1] This result is beyond the State's power to accomplish.

1. Viewing the instant case in light of the fact that the picketing grew out of a labor dispute the result reached below is in conflict with the NLRA, the "comprehensive regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce", *Nash* v. *Florida Industrial Commission,* — U.S. —, 36 U.S. Law Week 4046, 4047 (December 5, 1967), *Hill* v. *Florida,* 325 U. S. 538 (1945).[2] For the Act, as authorita-

[1] The trial court while willing to outlaw handbilling on the shopping center refrained from doing so because respondent did not request that relief (A. 98) ("A" references are to the record Appendix prepared for this Court). This happenstance does not change the fact that the rationale adopted by the court below would permit an injunction prohibiting handbilling if one were requested. This being so we believe that the statement in the text is accurate.

[2] The arguments based on the Act are fully developed by the Union. We agree with the points made by the Union and incorporate them by reference here. For this reason we deal with this aspect of the case in brief compass.

tively construed by the Board, permits the dissemination of information by a union on a privately owned thoroughfare open to the public, *Marshall Field & Co.*, 98 NLRB 88, 93 (1952) *enforced as modified* 200 F.2d 375, 380 (7th Cir., 1953). Indeed, as a general proposition, the Act protects the right of unions and union members to circulate their views, in a manner appropriate to the time and the location, upon property otherwise open to them without interference from the person holding title to that property, *see e.g. Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 796, 802 (1945), *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F.2d 128, 131 (2nd Cir., 1963), *certiorari denied* 376 U. S. 951. We, of course, recognize that under *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) unions do not have a right of access to privately owned property, closed to the public at large, unless they can show that alternative methods of communication are inadequate. But *Babcock & Wilcox* does not detract from our Supremacy Clause argument for it has no relevance here. This is so because there can be no doubt that the shopping center's thoroughfares were open to the picketing union members as long as they refrained from attempting to communicate their views on the Union's dispute with Weis. Thus here, as opposed to *Babcock & Wilcox,* the privilege to refuse access in the first instance to a group (there non-employees) is not involved, rather the Respondents seek to regulate the conduct of those who have a general invitation to come on the property.

Alternatively, the result reached below is beyond the State's power under the preemption doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). In *Garmon,* the Court stated, *Id.* at 244:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or

> constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes."

Given *Marshall Field, Republic Aviation* and *Babcock & Wilcox,* there can be no doubt that the picketing here is, at the least, arguably protected. Moreover, these cases show that the location at which informational activity takes place is of central, and not merely peripheral, concern under the Act, and that the standards of decision relating to such activity are not rigidly attuned to those of trespass. Finally, there can be no doubt that the overall regulation of picketing is a vital central concern of the Federal regulatory scheme, *see Garner* v. *Teamsters,* 346 U.S. 485 (1954). Thus all the classic ingredients of preemption are present here and none are absent.

2. Looked at more broadly, and without specific reference to the fact that conduct which the Act regulates is involved here, the result reached below is beyond the State's power because of the First and Fourteenth Amendments. The remainder of our brief will be devoted to a consideration of why this is so.[3] Our basic position is that a State, on its own, or at the behest of a private citizen, cannot consistent with the First and Fourteenth Amendments, close

[3] The Union's brief considers this issue and we agree with the views expressed there. The following is an attempt to analyze the point more extensively than was possible in that brief, given the number of complex issues it was incumbent upon the Union to discuss.

an area having the characteristics of a public thoroughfare to either peaceful picketing or handbilling designed to inform the public about a matter of general interest, on the bare ground that the holder of the title to that thoroughfare, or his lessee, has the unfettered discretion to control informational activity upon it because of his property rights.

The proposition that a public body cannot justify an abridgement of peaceful informational activity on the streets by arguments based on the fact that it holds title to them finds its roots in *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) where Mr. Justice Roberts stated:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Then, in *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939) this Court in an opinion by Mr. Justice Roberts, and in reliance on *Hague* and *Lovell* v. *Griffin*, 303 U. S. 444 (1938), held four city ordinances, which regulated the distribution of handbills, unconstitutional.[4] In its opinion the Court stated (308 U. S. at 163):

> "It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to dis-

[4] In the context of the instant case it should be noted that the Milwaukee, Wisconsin Ordinance in question there was applied to a union member "who stood in the street in front of a meat-market and distributed to passing pedestrians handbills which pertained to a labor dispute with the meat-market, set forth the position of organized labor with respect to the market, and asked citizens to refrain from patronizing it", (308 U.S. at 155).

> tribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Finally, in *Jamison* v. *Texas*, 318 U. S. 412, 415-416 (1943) the Court summed up the learning of the prior cases in the following terms:

> "The city contends that its power over its streets is not limited to the making of reasonable regulations for the control of traffic and the maintenance of order, but that it has the power absolutely to prohibit the use of the streets for the communication of ideas. It relies primarily on Davis v. Massachusetts, 167 U. S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. Hague v. Committee for Industrial Organization, 307 U. S. 496, 514-516. Of course, states may provide for control of travel on their streets in order to insure the safety and convenience of the traveling public. Cox v. New Hampshire, 312 U. S. 569, 574. They may punish conduct on the streets which is in violation of a valid law. Chaplinsky v. New Hampshire, 315 U. S. 568. But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word. Hague v. Committee for Industrial Organization, 307 U. S. 496, supra; Schneider v. Irvington, 308 U. S. 147. Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

In short, since the "liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value, Ex Parte Jackson, 96 U.S. 727, 733'', *Lovell*, 303 U.S.

at 452, only narrowly drawn regulations which are directed to such matters as the safety and convenience of the traveling public, are permissible when the State attempts to deal with the circulation of views on the streets. Where First Amendment rights are at stake common law property concepts, which would afford the State complete and absolute dominion over the streets, have no legitimate role to play. In this context, as in maritime law, these concepts, whose roots may be traced "to a heritage of feudalism" are not applicable "in an industrialized urban society," *Kermarec* v. *Compagne Generale Transatlantique*, 358 U.S. 625, 631-632 (1958). Thus, like the common law of libel, property concepts must, in appropriate instances, give way to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open", *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Allowing the States to close the streets at their discretion to the circulation of free speech would effectively curtail that debate to a substantial degree. It would inhibit the right of expression of those whose means are too limited to utilize methods of communication other than the handbill and the picket sign. It would, therefore, damage the entire society by limiting the opportunities of both the potential publishers and their auditors. *Cf. Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Talley* v. *California*, 362 U.S. 60 (1960). Moreover as this Court explicitly recognized in *Schneider*, *see* pp. 5-6 *supra*, the evil which would result is not abated by the fact that the State might choose to close only some streets to the circulation of information. The reasons are obvious from the facts of the instant case. Here, the Union was interested in reaching those who intended to trade with Weis. The natural and effective place to do so was on the thorough-

fare in front of Weis's store. The attempt to communicate with the limited class which the Union wished to reach could be frustrated by a variety of factors if that location was declared off limits. It could be frustrated by the fact that those interested in trading with Weis could only be identified as they approached the shopping center, and if they came by automobile, as is likely, their mode of conveyance would insulate them from the Union's message if that message was delivered at the outskirts of the center. It could be frustrated by the fact that the Union's limited manpower and resources would be dissipated if it attempted to reach the entire community in order to make sure that it reached the limited class to whom its message was relevant. It could be frustrated by the fact that a message remote in time and place tends to be drowned in the torrent of information the public receives every day. Indeed, the argument that the fact that other areas are left open to free speech should be taken into account as a justification for restricting speech elsewhere quickly reduces to an absurdity which justifies every abridgement. For every state and subdivision has power over only a limited geographic area, and unless all act in concert there is always an area, somewhere, open for the circulation of ideas.

The principles developed in *Hague, Schneider* and *Jamison* control where the State and a private party act in concert to regulate the dissemination of views on a public thoroughfare to which the private party has title. For in *Marsh* v. *Alabama*, 326 U. S. 501, 503-504, 505-506 (1946) which dealt with the power of a state to apply its trespass law to prohibit handbilling on a street in a company owned town this Court stated:

> "[A]ccording to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. There is nothing to stop highway traffic from coming onto the business block

and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

* * * *

"It is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by the state statute, to abridge [First Amendment] freedoms. We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. National Labor Relations Bd. 324 U. S. 793, 796, 802."

Marsh cannot be truncated by restricting its application to company towns. It has a broader more principled rationale: when a privately owned facility, which parallels a facility normally provided by a public body, is opened to the public in general the members of the public who come on the property carry with them the right to engage in activity which is protected by the Constitution. The State and the owner cannot combine to limit free access to that facility by subjecting such access to unconstitutional conditions which the State acting alone could not exact. Thus *Marsh* must be viewed as the natural development of, and safeguard for, the principles of *Hague, Schneider* and *Jamison*, for absent that decision the historical right to use the

streets to circulate views could be subverted by changes in patterns of land development which leave title to street frontage in the abutting property owner. Indeed the record here, and the background material developed in the *amicus* brief of the Retail Clerks International Association AFL-CIO, demonstrate that the modern shopping center is the exact equivalent, in the sprawling urban areas our motorized society encourages, of the business block in a privately owned company town, and, in turn, of the block of stores fronting on a public street. Therefore, the critical point in the instant case, in light of *Marsh*, is that the streets and sidewalks of the shopping center are open to motorists and pedestrians without a pass. The thoroughfares of the center are open to the community at large without the necessity of securing prior approval for entry. This being so, people on the sidewalks and streets of the shopping center, no less than people on other sidewalks and streets open to the public generally, carry with them "the constitutional right to express [their] views in an orderly fashion", *Jamison*, 318 U. S. at 416.

The fact relied on by the court below (A. 105) that the private party having title to the property here, at one and the same time, allows the public to use the driveways and walkways he provides without prior permission and also states that "No trespassing or soliciting is allowed" is of no moment against the right to exercise First Amendment rights. For the owner of the business block in *Marsh* had posted his property, a point this Court explicitly noted and found unavailing to the owner in making its decision. Nor, as the court below apparently supposed (A. 104-106) does the extent of the constitutional right to disseminate information on the streets and sidewalks turn on the owner's supposed intent, in inviting the public at large on to his

property, to restrict his invitation to "those who might benefit [his] enterprise". His intent does not control, rather it is the extent to which he has opened his property which controls. The property owner in *Marsh*, by having the appellant there arrested, demonstrated an intent to clear the business block of certain pedestrians who failed to make use of the commercial facilities it contained. But *Marsh* was decided in favor of the right of free speech. Finally, it makes no differences that the effect of the injunction here was to cordon off from picketing an area of 400 to 500 feet around a store rather than four to five miles or 400 to 500 miles. In *Marsh* there was a public highway 30 feet from the business block but that did not suffice to legalize the abridgement of free speech there, *see* pp. 7-8, *supra*.

3. This case involves dissemination of views to the general public through placards held aloft, i.e. picketing, and the cases just discussed dealt with the circulation of handbills. In its brief in opposition to the petition Respondents therefore argued that a picket sign directing a message to the general public is not the equivalent of a handbill and that pickets, carrying such signs, can be regulated by trespass laws even if handbillers with the same message can not (Br. in Op. 21-23). This argument is untenable. Handbilling and picketing on thoroughfares open to the public to inform the public about a matter of general interest are both immune from abridgements premised on the theory that the title holder of the street may, through the use of a trespass law, pick and choose the views which will be disseminated on that thoroughfare.

Recognition of one simple principle will cut away all the confusion which has grown up around the constitutional status of picketing, and will place every decision by this Court on the subject since *Thornhill* v. *Alabama*, 310 U.S.

88 (1939) in a coherent and consistent pattern. As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded other forms of circulating views, such as handbilling.

The test in *Thornhill,* 310 U.S. at 104-105, that an abridgement of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by Justice Holmes on behalf of this Court in *Schenck* v. *United States,* 249 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Cf. Dennis* v. *United States,* 341 U.S. 494, 510 (1951). Properly understood, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs one iota from the test enunciated in that decision.[5]

Put most simply, as has been stated by Professor Francis E. Jones, Jr., of Southern California Law School: "Picketing, like any other speech, is protected by the Constitution—as a *means;* however, like other speech, it will

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[5] We naturally do not concede that every picketing case was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our contention that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

not be protected when used for the purpose of accomplishing an unlawful *end.*''[6]

The pivotal decision is *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (1942). There this Court, in a unanimous opinion, upheld a state court injunction against peaceful picketing aimed at inducing wholesale distributors to agree with a union not to sell ice to nonunion peddlers, in violation of a state statute forbidding combinations in restraint of trade. The validity of state antitrust legislation being recognized, it was an easy step to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." *Id.* at 502. The gang leader's oral remarks to his henchman may be speech in the truest sense, but if they are in furtherance of a conspiracy to rob a bank, they are not immune from the regulatory power of government. See, *e.g.*, *Fox* v. *Washington*, 236 U.S. 273, 277 (1915).

In several of the cases where a ban on peaceful picketing has been upheld, the "unlawful end" or "substantive evil"

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[6] F. E. Jones, *Free Speech: Pickets on the Grass, Alas!—Admist Confusion, A Consistent Principle*, 29 So. Calif. L. Rev. 137, 157 (1956). (Emphasis in the original.) *See also* E. A. Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 Univ. Pa. L. Rev. 995, 1028 (1954).

In certain situations picketing might constitute a ''clear and present danger'' that a ''substantive evil'' will be accomplished, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is a function of the time and place and specificity of the message conveyed by the picketing, including any special signification attached to it by prearrangement among some particular group, and not something inherent in the nature of the conduct itself. Any other kind of speech or advocacy likewise may or may not represent a clear and present danger which can be declared unlawful, depending on its tendency to generate concrete action. Compare *Dennis* v. *United States*, *supra*, 341 U.S. 494, with *Yates* v. *United States*, 354 U.S. 298 (1957).

proscribed by governmental authority was the "exertion of *concerted* pressure" by employees, typically acting subject to union sanctions or loyalties, to compel a person to do an act which a constitutionally permissible public policy had declared should be left to his free choice. *See Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 726 (1942). (Emphasis supplied.) In certain cases the act which the union wanted someone to do was itself unlawful, as in *Giboney;* in these instances even a direct, uncoercive inducement of the act could have been prohibited. But where the act sought was lawful, the most this Court has ever held was that a person could constitutionally be insulated, in furtherance of a valid public policy, from the coercion brought to bear directly by a *combination* of employees, ordinarily acting pursuant to organizational rules and discipline. The Court has never held or suggested that it would be constitutional to prohibit anyone from advising individual members of the consuming public that an employer, or his employees, had refused or failed to do some lawful act, and requesting those individual consumers voluntarily to refrain from patronizing that employer or his product.

In addition to *Giboney,* where the wholesale ice distributors would have violated the Texas antitrust law by acceding to the union's demands, other cases in which picketing bans were upheld where, as the Court viewed the facts, even voluntary compliance with the union's desires would have been unlawful, include *Building Service Employees Local 262* v. *Gazzam,* 339 U.S. 532 (1950) (picketing to have employer force his employees to join a union, contrary to state statute forbidding such employer coercion); *Plumbers Local 10* v. *Graham,* 345 U.S. 192 (1953) (picketing to have employer require union membership as a condition of employment, in violation of state right-to-work law); *Teamsters Local 695* v. *Vogt,* 354 U.S. 284 (1957) (picketing to have employer force his employees to join a

union); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950) (picketing to have employer practice racial discrimination in hiring, contrary to state policy).[7]

Cases where the person who was the target of the picketing could lawfully have done the act requested, but where valid state policy decreed his decision should not be coerced by the concerted pressures of organized employees, are represented by *Teamsters Local 309* v. *Hanke*, 339 U.S. 470 (1950) (picketing to enlist union deliverymen and union patrons to force self-employer to abide by union working conditions); and the "secondary boycott" cases, *Ritter's Cafe*, *supra*, 315 U.S. 722, *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675; and *IBEW Local 501* v. *National Labor Relations Board*, 341 U.S. 694 (1951). In each of the last three cases a labor organization used picketing either as "a signal in the nature of an order to the members of the affiliated unions," 341 U.S. at 678, or as a "bare instigation," 341 U.S. at 701, 704, that organized employees leave their jobs or refuse to make deliveries, in order to force a supposed "neutral" to cease doing business with the primary employer.[8] We do not necessarily agree with the conclusions reached in all these decisions, but for the purposes of the

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[7] Sound as it is as an abstract proposition, the "unlawful purpose" doctrine can create a serious threat to First Amendment rights in actual practice, as members of this Court and academic observers have been quick to point out. See, *e.g.*, Douglas, J., dissenting in *Teamster Local 695* v. *Vogt*, *supra*, 354 U.S. at 296 ("state court's characterization of the picketers' 'purpose' had been made well-nigh conclusive"); Cox, *Strikes, Picketing and the Constitution*, 4, Vand. L. Rev. 475, 598-599, n. 97 (1961) ("[w]hat does give cause for great concern is the Court's astuteness in finding for recent injunctions some basis in a supposed state policy which will furnish a constitutional foundation").

[8] The rationales of "signal picketing" and "secondary boycott" were not expressly utilized in *Ritter's Cafe*, but they fit the facts as seen through the eyes of the Court.

instant case we need not quarrel with them. The crucial factor in every instance was that someone had a special interest of sufficient value, his status as an independent self-employer, or his status as a putative "neutral", that this Court felt the state could, consistent with the Constitution, protect him against being forced to relinquish it by a combination of employees responding to group discipline.

On the other hand, whenever this Court has dealt with peaceful picketing whose end was the doing of a lawful act by the target of the picketing, uncoerced by organized employees or a group acting in concert, the Court has consistently sustained the constitutional right of the picketers "to advise customers and prospective customers . . . and thereby to induce such customers not to patronize." *Thornhill,* 310 U.S. at 89; *AFL* v. *Swing,* 312 U.S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl,* 315 U.S. 769 (1942); *Cafeteria Employees Local 302* v. *Angelos,* 320 U.S. 293 (1943); *Teamsters Local 795* v. *Newell,* 356 U.S. 341 (1957) *reversing per curiam* 181 Kan. 898, 317 P. 2d 817.

This distinction makes for a rational and practicable demarcation line. If picketing is used to instigate mass action by organzed employees to make someone do a certain act, there may be occasions when society can constitutionally prohibit the mass action and the picketing or other "signal" used to set it in motion, *see Denver Building and Construction Trades Council, supra,* 341 U.S. at 678, even though the act sought is lawful in itself, and direct, uncoercive solicitation of it would be constitutionally protected free speech. But if the picketing is used simply to publicize the facts of a labor dispute and to request the voluntary support of individual consumers, acting wholly on their own without the pressure of group discipline, then such picketing is free speech as much as any other form of expression,

and cannot constitutionally be forbidden, as long as the act which the picketing seeks to bring about is itself a lawful one.

4. The short of it is this: both peaceful picketing and handbilling directed to the general public to publicize a union's position about a labor dispute are examples of expression protected by the First Amendment, and looked at in another dimension, both are examples of conduct which is inextricably bound up with the expression of views. Therefore attempts to limit the location at which such picketing or handbilling may take place must meet the standard developed in *Hague, Schneider, Jamison* and *Marsh* and recently restated in *Mine Workers* v. *Illinois Bar Association,* —U.S.—, 36 U.S. Law Week 4048, 4049, (December 5, 1967) in the following terms:

> The First Amendment would, . . . be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. Schneider v. State, 308 U. S. 147 (1939); Cantwell v. Connecticut, 310 U. S. 296 (1940)."

It is plain from what we have shown on pp. 4-11 *supra* that the application of the Pennsylvania trespass law here cannot be sustained under this standard.

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

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December, 1967

SUPREME COURT, U. S.

DEC 28 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, *et al.*,

Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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INDEX

PAGE

Motion for Leave to File Brief Amicus Curiae 1

Interest of Amicus 3

Statement of Facts 3

ARGUMENT

I. Prohibition of peaceful picketing in a public or quasi-public place abridges the First Amendment 5

II. The shopping center in the case at bar is public for purposes of the application of the First and Fourteenth Amendments 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 542, 122 N. W. 2d 785 (1963) 12

Edwards v. South Carolina, 372 U. S. 229 (1963) 5

Farmer v. Moses, 232 F. Supp. 154 (S. D. N. Y. 1964) .. 12

Freeman v. Retail Clerks Union, 58 Wash. 2d 426, 363 P. 2d 803 (1961) 13

Hague v. C. I. O., 307 U. S. 496 (1939) 6

Kovacs v. Cooper, 336 U. S. 77 (1949) 10

Marsh v. Alabama, 326 U. S. 501 (1946) 6, 7, 11

Maryland v. Williams, 55 L. R. R. M. 2357 (Md. Crim. Ct. 1959) 13

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 275 (1941) 9

Mills v. Alabama, 384 U. S. 214 (1966) 10

Moreland Corp. v. Retail Store Employees Union Local 444, 16 Wis. 2d 499, 114 N. W. 2d 876, 879 (19) 13

PAGE

National Lab. Rel. Bd. v. Babcock and Wilcox Co., 351 U. S. 105 (1956) 7
National Lab. Rel. Bd. v. Fruit and Vegetable Packers, 377 U. S. 58 (1964) 10-11
National Lab. Rel. Bd. v. United Steelworkers, 357 U. S. 357 (1958) 7

People v. Collins, 16 N. Y. 2d 554 (1965) 11
People v. Dews, New York Law Journal, June 16, 1967, p. 16 (App. Term 1st Dept.) (not off. rep.) 12

Saia v. New York, 334 U. S. 558 (1948) 10
Schneider v. State of New Jersey, 308 U. S. 147 (1939) 6, 10
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rptr. 233, 394 P. 2d 921, cert. den. 380 U. S. 906 (196) 13
Thornhill v. Alabama, 310 U. S. 88 (1940) 2

United States v. Federal Communications Commission, No. 21147 8
United States v. Storer Broadcasting Co., 351 U. S. 192 (1956) 8

Williams v. Wallace, 240 F. Supp. 100 (M. D. Ala. 1965) 10
Wolin v. Port of New York Authority, 268 F. Supp. 855 (S. D. N. Y. 1967) 11

United States Constitution:

First Amendment 1, 2, 5, 6, 7, 9, 10, 11, 12
Fourteenth Amendment 6, 11

Other Authorities:

Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1655-1656 (1967) 9
Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 883 (1963) 7, 9
Federal Communications Commission, Rule 3.636 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union is a private, non-profit, non-partisan organization engaged solely in the protection of the Bill of Rights. It files this motion because the respondent has denied the ACLU's request that it consent to the filing of a brief amicus curiae. Respondent's letter has been filed with the Clerk of the Court.

We move for leave to file this brief because we believe that this case presents important questions which relate directly to the extent to which the right to picket is protected by the First Amendment. The right to picket is perhaps the most traditional form of expression, and the one most easily available to groups with limited financial

resources. It has long been recognized by this Court as a form of expression protected by the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

The extent of the right to picket is put to a new test in the case at bar. The case is an example of one question raised by the force of economic concentration, namely, whether a business organization can insulate itself from what it considers a disagreeable form of expression by asserting that its property rights are paramount to its opponents' speech rights. We believe they cannot and wish to file the attached brief in order to set forth our reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

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—v.—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus is set forth in the motion for leave to file, *supra*.

Statement of Facts

Petitioner, Amalgamated Food Employees Union Local 590 (hereinafter Union), seeks to overturn an order of the Supreme Court of Pennsylvania, three Justices dissenting, affirming a *nisi prius* decree enjoining all picketing at and trespassing on the private property of respondent Logan

Valley Plaza, Inc. The injunction was originally issued *ex parte* by the Court of Common Pleas of Blair County on December 27, 1965. The Union moved to dissolve the injunction. After an evidentiary hearing the Court of Common Pleas denied the Union's motion and entered an order on February 14, 1966 "making permanent the injunction as previously decreed." The facts upon which the injunction was issued are briefly as follows:

Logan Valley Mall is a newly developed shopping center, situated in Logan Township near the city of Altoona, Pennsylvania, at the intersection of two public highways. It is approximately 1.1 miles around its perimeter, and contains a number of stores and other enterprises. At the time of the events in this case it was occupied by Sears Roebuck and Company, which operated a department store and a service station, and by respondent Weis Markets, Inc. The Weis property consists of a modern building with an open but covered porch running along the front and a pick-up zone directly along the porch. There are extensive parking lots to the east and south of the store, and there are also pedestrian ways. The nearest entrance from the highway is approximately 350 feet from the Weis property and the main shopping center entrance is 450-500 feet away.

Weis opened for business on December 8, 1965, employing an entirely non-union staff. Beginning on December 17, 1965, groups of between five and seven men and women walked back and forth in front of Weis, primarily in the pick-up zone, carrying placards which advised the public that Weis was non-union and identifying themselves as members of the Amalgamated Food Employees Union Local 590, the petitioner herein. The picketing was peaceful and unaccompanied by either threats of disorder or

disorder. Weis' assistant general manager told the pickets that they were trespassing, and ordered them to picket on the highway. After the injunction issued, petitioner began to picket on the highway's edge at four entrances. When the highway picketing began, the picketers began to give out handbills urging the public not to patronize non-union markets.

ARGUMENT

I.

Prohibition of peaceful picketing in a public or quasi-public place abridges the First Amendment.

This case concerns the right of individual citizens to engage in peaceful picketing designed to inform their fellow citizens of conditions involving a labor dispute, and to influence their conduct through the communication of this information.

The right to speak freely, to inform, and to dissent, is a basic right. Picketing is but one of the ways in which the right is exercised. Thus *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963) characterized an orderly demonstration involving more than 150 picketers protesting segregation on the South Carolina State House grounds as "an exercise of these basic constitutional rights [of speech, assembly, and petition for redress of grievances] in their most pristine and classic form."

Had the conduct enjoined in the present case occurred on publicly owned streets and sidewalks, it would have unarguably fallen within the protection of the First and

Fourteenth Amendments. Traditionally the public streets, parks, and meeting places have been recognized as places in which the exercise of First Amendment rights is proper and fitting, not only because they are held in trust for all citizens, but also because they are usually places where large numbers of fellow citizens can be reached. These sites are the "natural and proper places for the dissemination of information and opinion." *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939); *Hague* v. *C. I. O.*, 307 U. S. 496, 515, 516 (1939). Similarly, when privately owned property is in fact fulfilling a governmental function, the right to free expression on that property must be recognized. As this Court stated in *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

The *Marsh* holding is clearly applicable to the instant case. Respondents are in fact the "government" of this commercial land area. They have chosen to open their property to the general public for the purposes of trade. Petitioners sought only to impart information concerning that trade to respondents' invitees.[1] Under the circumstances, respondents' admitted right to enjoy the use of their property must yield to the requirements of the First Amendment.

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[1] The public nature of shopping centers is further developed in Point II, *infra*.

Since *Marsh*, the "preferred position" of free speech and effective expression has been more clearly delineated. Professor Emerson emphasized the fundamental importance of "the right of all members of society to form their own beliefs and communicate them freely to others" as "an essential principle of a democratically organized society." It plainly follows, as Emerson observes, that "The principles [of a system of free expression] must be continually reshaped and expanded to meet new conditions and new threats to its existence." Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877, 883 (1963).

In earlier years when a factory had one gate, it was reasonable to require those with grievances against the management to picket outside that gate or on the public way. Today, however, such restrictions would be artificial because only a small proportion of workers would be reached.[2] The same problem is present in this case. More and more of the retail trade of the country is located in "shopping center cities", which function both as the "governments" of these commercial areas, and as quasi-private

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[2] This Court has recognized the difficulties of communication in the analogous situation of the enforcement of a so-called "non-solicitation rule" against union organization on an employer's property. As this Court wrote in *National Lab. Rel. Bd.* v. *Babcock and Wilcox Co.*, 351 U. S. 105, 112 (1956):

> "When the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

In *National Lab. Rel. Bd.* v. *United Steelworkers*, 357 U. S. 357 (1958), this Court also noted that a "showing that the non-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees" was "a vital consideration in determining the validity of the non-solicitation rule." 357 U. S. at 363.

no-man's land between the public way and the grocery store.[3] To restrict the picketers to the publicly owned pavement favors property rights over the picketer's free speech rights. It is cold comfort to the union man fighting for the right to bargain collectively, to the Negro fighting for a job, to the housewife fighting an inexplicable rise in the price of eggs, to know that they can effectively picket the neighborhood candy store, but can only wave from the horizon at the vast accumulation of capital nestled inside a shopping center. Shopping centers are where the action is, and picketing the security guards at the edge of the parking lot is an exercise in futility.

In general, both the means of communication and available audiences have become increasingly concentrated. The independent newspaper is becoming extinct; in most cities, all daily papers are under a single ownership. In broadcasting, the dangers of concentration of ownership were early recognized by the Federal Communications Commission, whose Rule 3.636, commented on in *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), included a blanket prohibition against the ownership of or "direct or indirect" interest in more than five television stations by one person or company. Television stations, far from expressing divergent viewpoints, all too frequently present no viewpoint at all. These centripetal forces are illustrated by the pending acquisition by the International Telephone and Telegraph Company of the American Broadcasting Company.[4] In sum, rather than a system of open com-

[3] See statistics on the growth of shopping centers cited at pp. 31-32 of petition for certiorari.

[4] The validity of the merger is pending before the U. S. Court of Appeals for the District of Columbia in *United States* v. *Federal Communications Commission*, No. 21147.

munication in which diversity of opinion is the rule, the system approaches a closed market place in which only a "single point of view with minor variations, can find an outlet." Emerson, *op. cit. supra* at 953.

> "Today ideas reach millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1655-1656 (1967).

Without enormous financial resources, a person or an association of persons is confined to picketing, handbilling, and similar personal demonstrations in the attempt to communicate with the public, and the effort to secure public notice through the media. As this Court has observed, "Peaceful picketing is the workingman's means of communication." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 275, 293 (1941). If their efforts are not to be entirely futile, then the First Amendment must be construed in a way that will both permit and encourage the most expansive use of the limited forms of communication available to petitioner and others in similar circumstances.

Respondents contend that because the state court injunction did not prohibit picketing altogether, but merely moved

it some 350 feet away to the highway, petitioner's First Amendment rights were not infringed. Respondents' Brief in Opposition, p. 6. Such an argument ignores both the realities of the situation and the requirements of the First Amendment. First Amendment rights can and should be exercised in the place where they will be most effective. As this Court has stated:

> ". . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

The individual or individuals exercising First Amendment rights may also choose the most effective time, *Mills* v. *Alabama*, 384 U. S. 214 (1966), and manner in which they can be most effective, *Saia* v. *New York*, 334 U. S. 558 (1948); *Kovacs* v. *Cooper*, 336 U. S. 77, 87 (1949); see *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mandatory injunction authorizing a 45 mile protest march on a public highway by civil rights demonstrators from Selma to Montgomery, Alabama).

As Mr. Justice Black has stated:

> I cannot accept . . . [the] view that the abridgement of speech and the press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop. *National Lab. Rel. Bd.* v. *Fruit and*

Vegetable Packers, 377 U. S. 58, 79-80 (1964) (concurring opinion).

This rationale is equally applicable here. It is true that all motorists must enter the shopping center through one of five entrances, and that all motorists would, therefore, have to pass picketers if they were stationed at every entrance. Such a view, however, ignores the obvious fact that motorists traveling at a substantial speed and exiting from a highway will, hopefully, be watching the road, the exit itself, and the painted lanes which serve as roads across the parking lot. Under such circumstances, there is hardly the time for communication of any message, let alone contemplation of it. Under respondents' argument, the picketers might as well be required to remove themselves to the town of Altoona itself.

II.

The shopping center in the case at bar is public for purposes of the application of the First and Fourteenth Amendments.

There is no question that the shopping center involved in the instant case is dedicated to the public use and therefore subject to the application of the First and Fourteenth Amendments. *Marsh* v. *Alabama, supra.* In determining whether any particular location is public in this sense, the courts look to constitutional principles rather than the law of property. See *Wolin* v. *Port of New York Authority*, 268 F. Supp. 855 (S. D. N. Y. 1967) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City); *People* v. *Collins*, 16 N. Y. 2d 554 (1965), affirming 44 M: 2d 430, 254 N. Y. S. 2d 182 (App. T. 2d Dept.

1964); *Farmer* v. *Moses*, 232 F. Supp. 154 (S. D. N. Y. 1964) (exercise of First Amendment rights inside the New York World's Fair Grounds); *People* v. *Dews*, New York Law Journal, June 16, 1967, p. 16 (App. Term, 1st Dept.) (not off. rep.) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City).

A shopping center, by definition and purpose, is a place open to all members of the public to view and to buy merchandise and to obtain services of various kinds. The stores within the shopping center invite all citizens to come, to look, and to buy. The concourses and sidewalks within the shopping center function as thoroughfares for pedestrians just as public sidewalks function for shoppers in stores fronting on public streets. The shopping center parking lots provide a place not only where vehicles may be left while their owners walk through the center, but also provide what are in effect access roads from the highway to the shops themselves. In actual fact, the modern shopping center differs from the traditional town shopping area only in the happenstance that title to the land is privately held, a fact which is probably unknown and of little or no concern to the many thousands of persons who visit it.

The essentially public nature of the modern shopping center has been recognized by many courts in a number of contexts. In a suit for an injunction by a union, the Michigan Supreme Court held that management's interference with the union's distribution of handbills on a shopping center sidewalk was a violation of the First and Fourteenth Amendments. *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 542, 122 N. W. 2d 785 (1963). The Supreme Court of California similarly upheld

peaceful picketing inside a shopping center, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rptr. 233, 394 P. 2d 921, *cert. den.* 380 U. S. 906 (196). See also *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803 (1961); *Moreland Corp.* v. *Retail Store Employees Union Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876, 879 (19); *Maryland* v. *Williams*, 55 L. R. R. M. 2357 (Md. Crim. Ct. 1959).

CONCLUSION

For the reasons set forth above, the decision of the Court below should be reversed.

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SUPREME COURT. U. S.

Office Supreme Court, U.S.
FILED
JAN 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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LOCAL 590, *et al.*,

Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' OBJECTIONS TO MOTIONS OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

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Respondents respectfully oppose the motions by the American Federation of Labor and Congress of Industrial Organizations and the American Civil Liberties Union for leave to file briefs *amici curiae* for the following reasons:

1. The AFL-CIO is a federation of one hundred and twenty-nine (129) affiliated labor organizations, one of which is the Petitioner. The Retail Clerks International Association which is also a member of the AFL-CIO, has been granted leave to file a brief as *amicus curiae* in sup-

port of Petitioner. Consequently, the AFL-CIO will in fact be adequately represented by two of its members. If this motion were granted, this Court then will be receiving briefs from three affiliates of the same organization, the AFL-CIO.

2. Since Petitioner, as well as the National Labor Relations Board, has filed a brief and the Retail Clerks International Association has been granted leave to file brief *amicus curiae*, the American Civil Liberties Union has failed to set forth reasons for believing that the issues before the Court will not adequately be presented by the parties as required by Rule 42(3) of the Court's Rules.

3. For these reasons Respondents are withholding their consent to the AFL-CIO and the American Civil Liberties Union filing briefs *amici curiae* and oppose the motion by each of them for permission to do so.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., AMICUS CURIAE.

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BRIEF OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., AMICUS CURIAE.

INTEREST OF AMICUS.

The International Council of Shopping Centers, Inc. is a not-for-profit corporation. Its membership of 2400 consists of entities and individuals involved in construction, acquisition, leasing and management of shopping centers. There are approximately 10,500 to 11,000 shopping centers in operation in North America. They account for approxi-

mately one-third of all retail sales, exclusive of the sale of automobiles and building materials. It is the only trade association representing the shopping center industry in the United States.

The Council's interest is obvious from the nature of the far-reaching contentions advanced to the Court:

1. By petitioners, that union pickets' rights of free speech should be extended so as to permit picketing on private property, specifically the parking lots and loading zones of the shopping center involved here, no showing having been made that respondents ever permitted any other non-shopping center use of the property;

2. By the *amicus* brief of the American Civil Liberties Union, which suggests that similar rights should be extended not only to union pickets, but also to other demonstrators who *believe shopping center property provides* a more "effective" site for their activities than public property (p. 8).

Either contention, if accepted, would result in expropriation of private property, the access to which has heretofore been limited to those in either actual or potential business relations with the owner or tenants of the shopping center. The matter is of considerable importance to shopping center owners and tenants as their income is dependent upon the untrammeled availability, and ease of customer access to, parking space.

The written consents of counsel for petitioners and respondents have been filed with the Clerk of this Court.

ARGUMENT.

While petitioners' arguments in favor of permitting pickets to invade private property are couched in the evocative and ringing rhetoric of civil liberties, the sole asserted justification for this novel proposition is that it would make such picketing more "effective" (p. 24). We will show:

(1) This Court has never accepted "effectiveness" as a justification for the right to demand access even to public property where the asserted right of free speech would conflict with the limited use to which the property has been put.

(2) The only decisions of this Court which have recognized a right of access to private property as a necessary adjunct of free speech have involved company towns, logging camps or other areas from which the inhabitants emerge only rarely and irregularly, and those decisions have sought to protect such inhabitants from censorship.

(3) A decision holding that the right of free speech embraces a right of access to the speaker's favored forum on others' property would wreak havoc with shopping centers and with all attempts by owners, public or private, legitimately to select the use to which their property is to be put. As to shopping centers, it would constitute an unlawful, uncompensated, expropriation of private property for the private use of others.

1. This Court recently rejected the proposition that the right of free speech carries with it the right to picket or demonstrate everywhere on publicly owned property. In *Adderley* v. *Florida*, 385 U. S. 39 (1966), petitioners were students who had been convicted of trespass for demonstrating on the premises of a county jail protesting

against some of their schoolmates' arrests in civil rights demonstrations. This Court scotched the notion that a speaker has a constitutional right to demand access to any site felt by him to be "particularly appropriate":

> "*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also *particularly appropriate.* . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases Petitioners rely on, *Cox* v. *Louisiana, supra,* at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." (pp. 47-48, emphasis added.)

Four members of the Court dissented on the ground that the demonstration was a petition for the redress of grievances and that the jailhouse was a "seat of government" and therefore appropriate for such a protest (p. 49). However, the dissent recognized that "to say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government not to private proprietors" (p. 52).

Even as to publicly owned property the dissent recognized no right of unlimited access:

> "A noisy meeting may be out of keeping with the serenity of the state house or the quiet of the court-

house. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally." (p. 54.)

The Court has expressed similar views as to the rights of groups holding public meetings on private property to exclude persons desiring to speak from such forums. In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), which involved the constitutionality of a municipal ordinance forbidding the use or operation of sound trucks on public streets, the Court observed:

> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism."
>
> • • • • •
>
> "While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign *'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. Martin* v. *Struthers*, 319 U. S. 141, 143, 148." (pp. 86-87; emphasis added.)

2. The only cases in which this Court has held that the right of free speech carried with it a right of access to private property have involved company towns, logging camps or other areas where the right of a community of citizens has been involved. Thus, in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the Court in a divided opinion reversed a conviction for trespass stemming from Marsh's distribution of religious literature on the sidewalks of a company-owned town. The essential reasoning was:

> "[T]he circumstance that the property rights to the premises where the deprivation of liberty, here in-

> volved, took place, were held by others than the public, is not sufficient to justify the State's permitting a *corporation to govern a community of citizens so as to restrict their fundamental liberties* and the enforcement of such restraint by the application of a state statute." (p. 509; emphasis added.)

The Court reasoned:

> "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. *To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.* There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (pp. 508-509; emphasis added.)

Justice Frankfurter filed a concurring opinion stating "[t]hese community aspects are decisive in adjusting the relations now before us . . ." (pp. 510-511).

Marsh v. *Alabama* was, of course, the precursor of other decisions recognizing the right of access to company-owned towns or other isolated communities of citizens: *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226 (1946) (company town); *NLRB* v. *Lake Superior Corp.*, 167 F. 2d 147 (C. A. 6, 1948) (company-owned logging camp); *NLRB* v. *City Service Oil Co.*, 122 F. 2d 149 (C. A. 2, 1941) (ship's crew). That the community aspects of these cases were decisive was re-emphasized again in *Evans* v. *Newton*, 382 U. S. 286 (1966) both by the majority and dissent.

The instant case does not involve a company town or a community of any variety. No one lives in the shopping center. There are no citizens whose right to know need be

protected from censorship; no inhabitants whose rights to speak may be inhibited.

It is therefore apparent that the petitioners can find no comfort in the prior decisions of this Court, but rather are asking it to manufacture new constitutional doctrine out of thin air. Certainly a plain reading of the First and Fourteenth Amendments can support no such invasion of the landowner's right to control his property and use it as he sees fit.

3. A few practical observations should be made.

Shopping centers are a response to the needs and demands of customers, the principal two of which are: (1) their need and desire for adequate parking space immediately adjacent to where they intend to make their purchases; and (2) the desire of the consumer for one-stop shopping. Neither in this case nor in general is there the slightest bit of evidence that shopping centers are designed to insulate tenants from labor unions.

The gross sales of a shopping center are so dependent upon available parking space, and land for parking is so expensive, that this *amicus* has subsidized studies by the Urban Land Institute which have concluded, that there is an optimum ratio of parking spaces to the gross leasable area of the shopping center. (Aronov, Aaron in Chain Store Age Sp. Ed. E. 41, May, 1967.) The shopping center also bears the heavy costs of taxation and maintenance of the parking lot and other common areas. It follows therefore that, as a matter of economic self-defense, shopping center owners and tenants typically prohibit non-business use of their parking facilities, one of their most valuable assets, and mutually covenant that the parking lots and other common areas will be used solely for the purposes for which designed.

The steps which shopping center owners take to limit

the use of their property to customers vary, but among the more common are: posting signs informing the public that the shopping center is private property "for use by customers only"; placing chains across entrances during non-business hours; towing away cars parked there by non-customers; restricting employee parking to designated areas; prohibiting the placing of advertising material on cars parked in the center; and otherwise policing the area.

At the time of the issuance of the injunction in this case the shopping center was only partially open, only two tenants having their business in operation (R. 88). (Petitioners assert that there are now fifteen additional businesses there (p. 3, fnt. 1).) Nevertheless, even though the shopping center was new, what little evidence there is in the record will not support petitioners' extravagant claim that, "*unlike other members of the public,* the picket with a labor message has not been invited to enter."

There is no evidence in the record that the Logan Valley Plaza was opened to the public except for persons who were customers, or potential customers, or had other business relationships with either the owner or tenants. There is no evidence that it had ever permitted its parking lot, or that Weis had permitted its parcel pick-up zone, to be used for other purposes. The only evidence is to the contrary—the Weis manager asked the manager of a competitive store who had blocked the pick-up zone with his car to move it and he did so (R. 30-31).

The effects of the picketing demonstrate precisely why the shopping center owner and tenant necessarily attempt to exclude non-customers of whatever persuasion from their property. The pickets marched two, three and four abreast (R. 32, 47) in the vicinity of the parcel pick-up zone (R. 29) "right where the cars will drive in for the groceries" (R. 47). The picketing "hindered the cars from driving in" (R. 47), "causing congestion" (R. 30) in the

pick-up zone, resulted in a "milling around" (R. 30) of customers among the moving cars, required "navigating by customers in and out" (R. 44) and endangered the pickets (R. 44) and undoubtedly customers as well.

It is obvious that petitioners' conduct was wholly in conflict with the legitimate business purposes for which the parcel pick-up zone was intended.

4. Viewed more broadly, it is obvious that petitioners' essential argument is an attack on the fundamental right of an owner to determine and control the use to which his property is to be put and to exclude other persons from it where they endeavor to use it for purposes that conflict with the intended use. These rights to determine use and to prevent other use are essential attributes of the value of property to the owner. Moreover, the argument that the right of free speech carries with it the right of access to the speakers' most favored forum, and that those rights are superior to the rights of ownership, is a limitless doctrine leading to the grossest of absurdities. At the risk of belaboring the obvious, we suggest that the right of free speech does not justify intrusion into the quiet of the reading room of a public library, nor does it afford the Lutheran a right to "demand equal time" in a Catholic church. *A fortiori*, in the private sector no rule of law or reason requires a shopping center owner to permit his parking lots and sidewalks to become a cockpit for contending factions, assorted demonstrators, or business competitors. Any such result would clearly run afoul of the Fifth Amendment and amount to nothing more than the expropriation of private property for what petitioners conceive to be public purposes. If the need for unlimited access to parking lots of shopping centers be so vital to the public as petitioners contend, we suggest that the constitutional method of satisfying that (we say non-existent) need would be condemnation of the parking lots by the

appropriate state authority with fair compensation to the owner, removal of the property from the tax rolls, and assumption by the public of the burdens of maintaining it and providing police protection. If the public interest in the matter be as substantial as petitioners contend, the public is not without tools to protect it in a constitutional fashion.

CONCLUSION.

The decision of the Court below should be sustained.

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SUPREME COURT, U. S.

FILED

FEB 2 1968

JOHN F. DAVIS, CLERK

No. 478

In the

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, et al.,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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INDEX

PAGE

INTEREST OF THE AMERICAN RETAIL ASSOCIATION 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. TRESPASS IS A MATTER OF SUBSTANTIAL AND LEGITIMATE STATE CONCERN 7

II. THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION 10

III. THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT 19

CONCLUSION 25

AUTHORITIES CITED

CASES:

Adderley v. Florida, 385 U.S. 39 ..... 10, 12, 22

Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W. 2d 785 (1963) 9

Bakery Drivers Local 802 v. Wohl, 315 U.S. 79 .. 11

Blue Ridge Shopping Center v. Schleininger, 65 LRRM 2911 (S. Ct. Mo., July 10, 1967) 10

Breard v. Alexandria, 341 U.S. 622 13

Building Service Union v. Gazzam, 339 U.S. 532 11

Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 15

PAGE

Clark v. Rich's Inc., 114 Ga. App. 242, 150 S.E. 2d 716 (1966) 8

Cox v. Louisiana, 379 U.S. 559 11

Donovan v. Pennsylvania Company, 199 U.S. 279 .. 7

Excelsior Underwear, Inc., 156 NLRB 1236 17

Freeman v. Retail Clerks Union, 45 LRRM 2334 (Super. Ct. 1959), rev'd, 58 Wash. 2d 426, 363 P. 2d 803 (1961) 2

General Electric Co., 156 NLRB 1247 17

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 11

Hall v. Virginia, 188 Va. 729, 49 S.E. 2d 369 (1948); app. dism., 335 U.S. 875, reh. den. 335 U.S. 912 13

Hanna Mining Co. v. District 2, MEBA, 382 U.S. 181 24

Honolulu Typographical Union No. 37 (Hawaii Press Newspapers), 167 NLRB No. 150 18

Hotel and Restaurant Employees Local 802 v. Asimos, 216 Ark. 694, 227 S.W. 2d 154 (1950) .. 9

Hughes v. Superior Court, 339 U.S. 460 .....5, 11, 14

International Association of Machinists v. Gonzales, 356 U.S. 617 23

Linn v. United Plant Guard Workers, 383 U.S. 53 .....20, 22, 23, 24

Marsh v. Alabama, 326 U.S. 501 13

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 16

Millmen Union Local 324 v. MKT Railroad Co., 253 S.W. 2d 450 (Tex. Civ. App., 1952) 9

PAGE

Moreland Corp. v. Retail Store Employees Union, Local 444, 16 Wis. 2d 499, 114 N.W. 2d 876 (1962) 9, 10

NLRB v. Babcock & Wilcox, 351 U.S. 105 ..... 12, 16

NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 16

NLRB v. District 65, Retail, Wholesale Department Store Union, 375 F. 2d 745 (C.A. 2, 1967) 16

Nocar v. Greenberg, 210 Md. 506, 124 A. 2d 757 (1956) 8

People ex rel. Koester v. Rozensweig, 171 Misc. 702, 13 N.Y.S. 2d 795 (1939) 9

People v. Goduto, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961); cert. den., 368 U.S. 927 ..... 4, 8, 13, 23

People v. Poe, 236 Cal. App. 2d Supp. 928, 47 Cal. Rptr. 670 (1965) 9

People v. Weinberg, 6 Mich. App. 345, 149 N.W. 2d 248 (1967) 10

Plumbers Union v. Borden, 373 U.S. 690 21

Plumbers Union v. Graham, 345 U.S. 192 15

Reed v. State Farm Mutual Automobile Insurance Co., 188 So. 2d 756 (Ct. App. La. 1966) 8

Sailor's Union of the Pacific (Moore Drydock Co.), 92 NLRB 547 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 20

Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P. 2d 921 (1964); cert. den. 380 U.S. 906 ..... 9, 10

PAGE

Stafford v. Hood, 213 Tenn. 684, 378 S.W. 2d 766 (1964) 9

State v. Martin, 199 La. 39, 5 So. 2d 377 13

State v. Quinnell, ... Minn. ....., 151 N.W. 2d 598 (1967) 5, 7, 8, 10

Stoddard-Quirk Manufacturing Co., 138 NLRB 615 16

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Thomas W. Finucane Corp. v. State, 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. of Claims, 1966) .. 3

United Auto, A. & A. I. W. v. Wisconsin Emp. Rel. Bd., 351 U.S. 66 23

Vaca v. Sipes, 386 U.S. 171 20

Whittlesey v. United States, 221 A. 2d 86 (Ct. App., D.C., 1966) 10

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 316, 29 U.S.C. § 141 et seq. 19

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Retail Clerks Advocate 3, 18

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, et al.,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

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* Pursuant to Rule 42, §2 of the Rules of the Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief *Amicus Curiae.*

The interest of the Federation, in urging affirmance of the decision of the court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry.

This case has been phrased by Petitioners, and by the *amicus* briefs in support of Petitioners' position, as a "shopping center" case.[1] This characterization, however, is misleading and an oversimplification; the term "shopping center" simply will not function as a "phrase of art."[2] Rather, although the term has become broadly descriptive of certain business operations—and, indeed, will be used as a term of reference herein—"shopping centers" are not so precisely definable and cannot be so clearly differentiated from other forms of retailing that any rules here enunciated can be regarded as applicable only to a specific and delimited classification of enterprises.[3]

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[1] See Petitioners' Brief, p. 2; Brief of *amicus* Retail Clerks International Association (hereafter referred to as RCIA, pp. 1-4; Brief of *amicus* National Labor Relations Board (hereafter referred to as NLRB), p. 1 and Brief of *amicus* American Federation of Labor and Congress of Industrial Organizations (hereafter referred to as AFL-CIO), p. vi.

[2] Brief of RCIA, fn. 1. The footnote proceeds to give, for example, "*one* definition" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY that it is a group of retail stores "*usually* with general parking space and *usually* planned to serve a community or neighborhood" and to further point out that there "are *three of four generally accepted categories of shopping centers, variously defined.*" (All italics supplied.)

[3] Cf., e.g., *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2337 (Super. Ct., 1959), rev'd. on preemption grounds, 58 Wash. 2d 426, 363 P. 2d 803 (1961):

> "The term 'shopping center' can be applied to any number and variety of merchandising and service

Shopping centers can be of practically any size, ranging from large regional shopping centers to local neighborhood centers with but a few small independent stores.[4] In fact, the relatively smaller shopping centers predominate the field.[5] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they (1) offer a variety of-

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[3] (Continued)

operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'"

[4] Cf., e.g. the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

[5] As of January, 1965, there were a total of 8,076 shopping centers in the United States. Approximately 60% or 4,925 of the centers had a gross leaseable area of less than 100,000 square feet—which is an area smaller than 500 by 200 feet—with an average leaseable area of 56,000 square feet. Another 25% or 2,066 centers had a gross leaseable area of 200,000 square feet or less (the equivalent of 500 feet by 400 feet). These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,000 centers are "medium sized" (200,000 to 400,000 square feet) and but 400 are large or regional shopping centers. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967, pp. 28-29. Similar statistics, prepared by W. Donald Calomiris, president of the Institute of Real Estate Management, are quoted in the magazine of RCIA, *The Retail Clerks Advocate,* August, 1967, p. 6.

goods and services to the public, (2) are located on single tracts of land with definite established boundaries and (3) provide parking area for the customers—significantly, characteristics also present in and not substantially different from those of other types of retail enterprises or establishments which are not generally regarded as "shopping centers."

For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof."[6] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[7] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the cases of the sprawling one-story suburban shopping center or free standing store, are constructed on a vertical plane because of space limitations as those which exist in downtown locations.[8] Similarly situated

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[6] Applebaum, *id.* at 31.

[7] See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.*, 368 U.S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium-size "shopping centers".

[8] See Brief of RCIA, p. 7, referring to shopping centers that "have not only spread out, but they are building up." These centers frequently have customer parking areas constructed on several levels attached to the store with entrance into the store directly from the various levels of the parking area.

also are those multiple stores, shops and offices, located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community that makes the center or store "a market place whose very being inheres in its openness to the public."[9]

The interest of the Federation is predicated on the potentially substantial and far-reaching consequences that any decision herein may have for all methods of retail operation, rather than just "shopping centers" however they may be defined. The concern of the *amicus* is that the Court, in formulating the principles to resolve the instant controversy, should be aware of the ramifications thereof on all of these retail establishments as they may be affected by unlawful entry upon their property, whether by a labor union to picket for a variety of conceivable objectives[10] or by other organizations or individuals to propagandize other messages.[11]

SUMMARY OF ARGUMENT

The states have traditionally exercised a substantial and legitimate interest in regulating unauthorized entry upon the property of its citizens. This responsibility has been recognized not only as a basis for protecting the property rights involved and determining matters of

[9] Brief of Petitioners, p. 12.

[10] See, e.g., Brief of RCIA, p. 9.

[11] E.g., the factual situation involved in *State* v. *Quinnell*, ... Minn. ....., 151 N.W.2d 598 (1967), or *Hughes* v. *Superior Court*, 339 U. S. 460.

general state tort and state criminal law affected thereby, but also as a means of maintaining domestic peace and preventing the use of violence.

Petitioners have urged that, notwithstanding this paramount state responsibility, the power of Pennsylvania to regulate trespass has been withdrawn in the instant case by reason of the Federal Constitution and the National Labor Relations Act. This Brief will be addressed to articulating three premises which establish that this contention is without merit:

> First, that the regulation of trespass is a traditional and legitimate state concern;
>
> Second, that the power of states to engage in the reasonable enforcement of this interest, as in the present case, has not been withdrawn by the Federal Constitution; and
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> Third, that in view of the foundation of the state's interest in deeply-rooted local traditions and responsibilities, the effectuation of valid state policies in this area has not been pre-empted by the National Labor Relations Act.[12]

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[12] By discussing only these points, the Federation does not, of course, suggest that other points which presumably will be raised and argued by Respondents do not afford additional justifiable grounds for affirming the decision of the Supreme Court of Pennsylvania.

ARGUMENT

I.

TRESPASS IS A MATTER OF SUBSTANTIAL AND LEGITIMATE STATE CONCERN.

One of the principles most firmly embedded in our common law is that the unlawful and unauthorized entry upon the land of another is a trespass.[1] The determination of whether specific conduct constitutes a trespass and the protections to be afforded with respect to or against such conduct are matters of legitimate state concern. Indeed, a state has a paramount interest in the establishment of its applicable public policy in this area: first, to delineate the respective rights and obligations of its citizens as affected by such policies; and second, to maintain domestic peace and prevent public disorder.

This traditional state interest in regulating unjustifiable entrances upon the property of another is the touchstone of the premises presented by the Federation herein. It is precisely because of this concern that the several states, within the framework of their respective declared public policies and the confines of reasonableness imposed by the Federal Constitution, should be permitted to exercise their power to regulate this area.

The interest of the state goes far beyond the single question of whether picketing by a labor union in any specific case is enjoinable. It is reflected in and related to other areas which are clearly the recognized primary

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[1]Restatement (Second), Torts, Sec. 158; *Donovan* v. *Pennsylvania Company,* 199 U.S. 279; *State* v. *Quinnell,* ..... Minn. ....., 151 N.W. 2d 598 (1967).

concern of the states. For example, determination of liability under the general tort law of a state may often turn on the status of owners and occupiers of property in a shopping center *vis-a-vis* "intruders" or "bare licensees",[2] and may even involve the respective rights of third parties while on the parking area of the center.[3] Similar issues, involving whether there is an "implied license to enter upon the premises of another to engage in extraordinary activity *hostile* to the business of the owner", may also arise under state criminal laws.[4] All of these issues have traditionally, and properly, been resolved by the prevailing policies of the states.

The interest of the state is also inextricably entwined with its responsibility to maintain peace and order. This responsibility is not merely limited to preventing the continuance of force and violence or threats thereof; it also involves preventing the possible breaches of the peace or public disorders which are likely to occur as a result of the unauthorized invasion of property of another. The function of trespass actions in preventing violence has long been recognized. The particular concern of the states is well illustrated in the opinion of the Supreme Court of Illinois in *People* v. *Goduto,* 21 Ill. 2d 605, 609, 174 N.E. 2d 385, 387 (1961); *cert. den.,* 368 U.S. 927. In affirming the conviction for unlawful trespass of a union organizer in the parking lot of a retail store, the court stated:

> "It is apparent therefore that the criminal sanctions of the common law were not imposed primarily for

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[2] E.g., *Nocar* v. *Greenberg,* 210 Md. 506, 124 A.2d 757 (1956) and *Clark* v. *Rich's Inc.,* 114 Ga. App. 242, 150 S.E. 2d 716 (1966).

[3] *Reed* v. *State Farm Mutual Automobile Insurance Company,* 188 So.2d 756 (Ct. App. La., 1966).

[4] *State* v. *Quinnell,* ..... Minn. ....., 151 N.W. 2d at 602 involving demonstrators in a stockyards which was "traversed by various roadways."

> the protection of property rights but were imposed for the protection of public safety. This was a recognition of the fact that trespass can lead to violence. Indeed the owner or occupant of land has the right to use any force necessary to remove a trespasser in situations where there is no time to resort to the law. (See Prosser, Torts 2d ed., sec. 21). . . .
>
> "When a person refused to leave another's property after he has been ordered to do so, a threat of violence becomes imminent. It was for this reason that the legislature made this type of trespass subject to criminal prosecution. The basic purpose of the statute is the prevention of violence or threats of violence."

State courts have historically and consistently acted to determine their applicable public policies and the appropriate remedy to be afforded under such policies, whether criminal or civil, when conduct involved entry upon the property of another without consent, even though such cases involved picketing by labor unions or claims of justification based upon constitutional guarantees.[5] The

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[5] *People ex rel. Koester* v. *Rozensweig*, 171 Misc. 702, 13 N.Y.S. 2d 795 (1939); *Hotel and Restaurant Employees Local 802* v. *Asimos*, 216 Ark. 694, 227 S.W. 2d 154 (1950); *Millmen Union, Local 324* v. *MKT Railroad Co.*, 253 S.W. 2d 450 (Tex. Civ. App., 1952); *People* v. *Goduto*, 21 Ill.2d 605, 174 N.E. 2d 385 (1961); *cert. den.*, 368 U.S. 927; *Moreland Corp.* v. *Retail Store Employees Union, Local 444*, 16 Wis. 2d 499, 114 N.W.2d 876 (1962); *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 547, 122 N.W.2d 785 (1963); *Stafford* v. *Hood*, 213 Tenn. 684, 378 S.W. 2d 766 (1964); *Schwartz-Torrance Investment Corp.* v. *Bakery Workers, Local 31*, 61 Cal. 2d 766, 40 Cal. Reptr. 233, 394 P.2d 921 (1964); *cert. den.*, 380 U.S. 906; *People* v. *Poe*,

states, of course, may not always act uniformly.[6] But, "[t]hat is precisely what is meant by recognizing the [the relevant considerations] . . . are within the domain of a State's public policy."[7]

II.

THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION.

The Petitioners have sought to insulate their conduct by a simple, all-inclusive declaration: any infringement on the right to peacefully communicate their message at which they unilaterally determine to be its most "natural and effective" site abridges their Constitutionally-guaranteed rights. The state, according to Petitioners, is required to tolerate peaceful communication in all places; there is an unfettered right to propagandize views whenever and however and wherever one pleases.

This concept of constitutional law has been "vigorously and forthrightfully rejected" by this Court. *Adderley* v. *Florida*, 385 U.S. 39, 48. Initially, with respect to picketing,

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[5] (Continued)
236 Cal. App. 2d Supp. 928, 47 Cal. Reptr. 670 (1965); *People* v. *Weinberg*, 6 Mich. App. 345, 149 N.W. 2d 248 (1967); *Blue Ridge Shopping Center* v. *Schleininger*, 65 LRRM 2911 (S.Ct. Mo., July 10, 1967); and *State* v. *Quinnell*, ... Minn. ....., 151 N.W.2d 598 (1967). See also *Whittlesey* v. *United States*, 221 A.2d 86 (Ct. App., D.C., 1966).

[6] Cf., e.g., *Moreland Corp.* v. *Retail Store Employees Union, Local 444*, with *Schwartz-Torrance Investment Corp.* v. *Bakery & Confectionery Workers, Local 31*, *supra* n. 5.

[7] *Teamsters Union* v. *Hanke*, 339 U.S. 470, 478.

while it cannot be gainsaid that it "is *in part* an exercise of the right of free speech guaranteed by the Federal Constitution",[8] it is also incontrovertible that "since picketing is more than speech . . . this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket . . ."[9] "Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."[10] As the Court stated in *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 500-501, quoting, in part, *Bakery Drivers Local* v. *Wohl*, 315 U.S. 79:

> "'A state is not required to tolerate in all places . . . even peaceful picketing by an individual' . . . picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation. No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate the valid laws designed to protect important interests of society."

These principles were reaffirmed by this Court in *Cox* v. *Louisiana*, 379 U.S. 559, 563, thusly: "The conduct which is the subject of the statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited."

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[8] Brief of Petitioners, p. 19, quoting *Building Service Union* v. *Gazzam*, 339 U. S. 532, 536-537 (italics supplied).

[9] *Id* at 537.

[10] *Hughes* v. *Superior Court*, 339 U.S. 460, 465-466.

The right to communicate, whether by picketing or otherwise, affords no sweeping immunity against an assertion by a state of its legitimate public policies. Nor does freedom of speech impart a license to trespass. These principles were recognized again by this Court in *Adderley,* 385 U. S. at 47:

> "Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute. . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . .'"

The solution to the clash of competing interests in this "deceptive and opaque"[11] area lies only in a careful recognition of all the competing rights involved which "must be obtained with as little destruction of one [right] as is consistent with the maintenance of the other [right]." *National Labor Relations Board* v. *Babcock & Wilcox,* 351 U. S. 105, 112. *Babcock & Wilcox* did not, of course, have at issue the question involved in the instant case. It did not hold, nor even suggest, that states may not enforce their public policies as to trespass, or that the Board, as opposed to the state, is the proper forum to determine such policies. So far as the present case is concerned, the significance of *Babcock & Wilcox* lies in its recognition that an employer, even in an organizing campaign, may "validly post his property" insofar as there is

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[11] *Teamsters Union* v. *Hanke,* 339 U. S. 470, 478.

no unreasonable infringement upon the rights of the union. In contrast, what is involved here is the state's duty to protect the property rights involved, and prevent violence or potential violence as the result of, such valid posting.[12] This area is one in which states traditionally have been required to recognize and balance various conflicting interests, with the framework of constitutional guarantees, in effectuating varied state policies.[13]

The foregoing is not meant to suggest that all states would, or should, reach a similar result as that arrived at by the courts below. As discussed above, the relevant

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[12] This distinction was recognized by the court in *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d, at 388 thusly:

> "In addition to the State's interest in preserving domestic peace, the law recognizes the company's right to protect its property interests. . . . In [*Babcock & Wilcox*] . . . the court recognizes the property interest of the employer to be superior to the interest of the union in having a convenient means of communicating with employees. The notice or order of the employer is of little consequence, however, if it cannot be enforced."

[13] See, e.g., *Breard* v. *Alexandria*, 341 U. S. 622; *Hall* v. *Virginia*, 188 Va. 729, 49 S.E. 2d 369 (1948); *app. dism.* 335 U. S. 875, *reh. den.*, 335 U. S. 912; *State* v. *Martin*, 199 La. 39, 5 So. 2d 377 (1941). Cf. *Marsh* v. *Alabama*, 326 U. S. 501, where the balance struck by the state was held to be unreasonable since it applied to a company owned town. *Marsh* did not hold, however, that the states may not reasonably enforce their policies, where, as here, other means of communication are available. As one commentator stated respecting shopping centers and residential developments: "Some of these are undoubtedly larger in terms of volume of business or population than the town of Chicasaw. But a town, whatever its size, as a center in which its people conduct their business and exchange ideas is unlike either a shopping center or a large apartment development." Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083, 1098, fn. 54 (1960).

considerations in this area necessarily involve "a knowledge and appraisal" of deeply-rooted local "social and economic policies," and local feelings and responsibilities which may vary considerably from state to state.[14] But the Constitution does not command "logical symmetry";[15] "[t]hat other states have chosen a different path in such situations indicates differences of social views in a domain in which states are free to shape their own local policy." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296.

The result reached by the courts of Pennsylvania in this case was a reasonable one.[16] The injunction

[14] *Teamsters Union* v. *Hanke*, 339 U. S. at 475.

[15] *Hughes* v. *Superior Court*, 339 U. S. at 468.

[16] The Pennsylvania Supreme Court thus analyzed the nature and the physical description of the shopping center and the fact that Weis and Sears were the only tenants, the nature and location of the picketing, the non-employee status of the pickets, the limited, restricted invitation to the public on the part of the Respondents, and other similar, relevant considerations. The Court of Common Pleas of Blair County also exercised its "authority to balance the equitable considerations and to impose reasonable controls." The court not only also considered the factors analyzed by the Supreme Court, but also expressly noted the alternative channels of communication open to the Petitioners:

> ". . . nothing in the Great Leopard Case (*Great Leopold Market Corporation, Inc.* v. *Amalgamated Meat Cutters*, 413 Pa. 143, 196 A. 2d 675 (1964) clearly shows that an equally suitable area outside of the shopping center but in the immediate vicinity thereof existed which could be effectively utilized as a situs for picketing; in the present case, however, plaintiffs have affirmatively shown that access to the subject property may be had only from the two highways hereinbefore described and that both have berms of sufficient width appropriate to accommodate pickets." Pet. for Cert., p. 16a.

issued does not unduly restrict picketing, speech, or any form of communication. It is not an unwarranted "broadside against all picketing, the kind of general assault condemned by *Thornhill* v. *Alabama*";[17] rather, it is a limited decree "tailored to prevent a specific violation of state law."[18] All the injunction does—and nothing more—is to prohibit the Petitioners from entering and remaining upon the property of the Respondents and using it for the purpose of urging the public to shop elsewhere. Picketing and all other forms of lawful communication are otherwise available to the Petitioners without restriction.

Despite this limited form of restraint it is nevertheless argued that the court below did act unreasonably: that it failed to recognize that "[t]he vicinity of the store is the natural and effective place to communicate the picket's message"[19] and, therefore, "the only suitable place."[20] In short, the argument is that a union must have an absolute right to choose both its means and place of communication. The fallacy inherent in this approach is that it assumes the law to be rigid and absolute whereas, conversely, its hallmark in this area is the skillful adaptability and recognition of all interests. Labor organizations have often been required to accept allegedly less desirable or suitable means of communication where the method desired would either unduly infringe on the rights of other parties[21] or violate the

[17] Mr. Justice Douglas, dissenting, in *Plumbers Union* v. *Graham*, 345 U. S. 192, 204-205.

[18] *Ibid.*

[19] Brief of Petitioners, p. 24.

[20] Brief of RCIA, p. 9.

[21] See, e.g., *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722.

legitimate public policies of the states.[22] Significantly, Petitioners have implicitly recognized this principle. They do not here contend that they should have what is clearly their most "effective" means of communication to the public—a privileged right of entry on the porch and interior of the Weis property in order to freely propagandize their message to Weis' customers. On the contrary, as observed by the court below, they recognize that picketing *at these locations* would constitute an enjoinable trespass.[23] The National Labor Relations Board, as *amicus*, has likewise conceded that in such a case "the interest of the State in providing a remedy for that conduct is so great . . . that the State would not be barred from acting."[24] A union may also be restricted from picketing in the immediate vicinity of certain establishments located in multi-story buildings notwithstanding that an incidental effect thereof may be some insulation of such enterprises from some forms of concerted activities.[25] Similarly, limitations have been imposed by the Board and courts on what has been alleged to be the most effective and desirable means of communication in other situations.[26]

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[22] See, e.g., *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

[23] 425 Pa. 382, 227 A. 2d 874 at n. 5.

[24] Brief of amicus *NLRB*, p. 17.

[25] Cf. *NLRB* v. *District 65, Retail, Wholesale Department Store Union*, 375 F. 2d 745 (C.A. 2, 1967); *Gimbel Brothers, Inc.*, 100 NLRB 870.

[26] E.g., the limitations imposed on the absolute right to communicate in cases of solicitation and distribution (*NLRB* v. *Babcock & Wilcox, supra; Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964)), "common situs" picketing (*NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S.

Effectiveness and suitability, accordingly, are not the sole criteria. Reasonable imposition of legitimate state policies may justifiably preclude utilization of what a union unilaterally determines to be "the natural and effective place to communicate the picket's message."

The corollary argument that "other methods of communication . . . are usually too expensive and too diffuse"[27] cavalierly disregards the countless, varied means of communication that have been utilized by labor organizations, the advertising industry, political organizations, charitable and religious solicitors, and others in the many years that they have dealt with their similar problem of communicating a message to the public.[28] Similar forums are

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[26] (Continued)
675; *Sailors' Union of the Pacific* (*Moore Dry Dock Co.*), 92 NLRB 547), and the availability of an employer's premises for "captive audience" organizational speeches as opposed to the availability of lists of the names and addresses of all eligible voters (*General Electric Co.*, 156 NLRB 1247 and *Excelsior Underwear, Inc.*, 156 NLRB 1236).

[27] Brief of RCIA, p. 8. See also Brief of *amicus* American Civil Liberties Union, pps. 8-9 and Brief of AFL-CIO, pps. 7-8.

[28] The Petitioners thus not only have alternative, effective places in which to communicate their message to the Weis public through picketing but numerous other methods of communication as well. There are the traditional communication weapons, for example, of handbill distributions, mailings, house-to-house solicitations, newspaper and magazine advertisements, telephone calls and public meetings or speeches. In addition, an examination of the *Retail Clerks Advocate* for last year alone reveals communication of the Union's message to the public through a multitude of additional devices: a national consumer boycott involving "hundreds of picket demonstrations, tens of

equally available, and, if utilized,[29] would no doubt prove

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[28] (Continued)
millions of leaflets, balloons and bumper stickers . . . to tell the story" (June, 1967, p. 3); announcements on a national television network "to advise customers of the benefits of shopping where they see the RCIA store card" (July, 1967, p. 18); state and county fairs, holiday celebrations and other summer festivals to provide "the opportunity to publicize the RCIA and the union store card" (October, 1967, p. 12); extensive distribution of RCIA shopping bags (June, 1967, p. 5 and October, 1967, p. 12); outdoor billboards in "strategic locations" (July, 1967, p. 14); sponsorship of local radio or television programs (October, 1967, p. 12, and April, 1967, p. 16); sponsorship of local sports teams (October, 1967, pp. 12, 27); floats entered in holiday parades (November, 1967, pps. 12, 26); Union Label Week in New York City (October, 1967, p. 28); union-industry show exhibits (July, 1967, p. 14); a "mile-long caravan" of automobiles to protest the Sunday selling of cars (January, 1967, p. 28) and even skywriting, "a new idea in publicizing the 'shop union' theme" (November, 1967, p. 26).

[29] Petitioners note, for example, that in *Honolulu Typographical Union No. 37 (Hawaii Press Newspapers)*, 167 NLRB No. 150, "the police refused to permit the union representatives to enter the shopping center. . . . The union therefore picketed and distributed handbills to the public at the entrance to the shopping center." Brief of Petitioners, p. 45. The union in that case, however, did not restrict itself only to these alternative uses of the handbill and the picket sign. As described by the Board Trial Examiner (TXD, sl. op. p. 6):

> ". . . the Union arranged that a flat-bed truck be parked in front of Market Place. On this truck a series of Hawaiian, Tahitian and Samoan musicians and dancers gave a free performance, which at the place, approximately the center of Waikiki, attracted a large and appreciative audience. This audience, it is undisputed, was of such size that it filled the sidewalk, from building line to curb, all across the entrance to Market Place. It was such a dense crowd

to be equally effective,[30] to Petitioners in the instant case.

III.

THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Petitioners have further sought to immunize their conduct from state regulation by asserting that the area here involved has been pre-empted by the National Labor Relations Act[31] and thereby withdrawn from state power. This issue, "a variant of a familiar theme", requires that the Court once again "render . . . progressively clear" that "penumbral area" in which the Act has "left

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[29] (Continued)

> that some pedestrians crossing Kalakaua Avenue at the crosswalk at that location had difficulty reaching safety on the curb, and the police had to manage the audience, so that street traffic and pedestrian traffic would not be impeded.
>
> • • •
>
> "On another occasion, when picketing occurred . . . . the truck had musicians with Tahitian and Somoan drums and horns. The truck was equipped with electronic amplifiers which were turned up to extremely high volume. The amplification system drowned out Beach's [a shopping center tenant] own music system in his lounge, and annoyed three specific customers to the point that the three men left the lounge, after complaining to Beach."

[30] Although the RCIA alleges it "has a daily problem of securing access" to shopping centers, it nevertheless estimates that it presently "represents more than 200,000 employees who work in stores located in 'shopping centers' in the United States." Brief of *amicus* RCIA, pp. 1-2.

[31] 61 Stat. 316, 29 U.S.C. § 141 *et seq.* (hereafter referred to as the "Act").

much to the states." *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 239-40. Its resolution, to paraphrase *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 57, "entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against [trespass]."

This "penumbral area," as recognized by *Garmon* and subsequent decisions, extends beyond regulation of that activity which is not arguably subject to either Section 7 or 8 of the Act. The pre-emption doctrine also has "due regard for the presuppositions of our embracing federal system,"[32] and, accordingly, "has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to be with the NLRB."[33] The recognized area in which "this Court has refused to hold state remedies pre-empted" thus includes state regulation where either "the activity regulated was a merely peripheral concern of the . . . Act", or alternatively, and clearly indicated by Garmon[34] to be a distinct, separate criterion, where the activity "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] . . . could not infer that Congress has deprived the States of the power to Act." *Vaca* v. *Sipes,* 386 U.S. at 180, and cases cited therein.

The Federation is in agreement with the Respondents' position that the conduct involved in the instant case is not arguably subject to either Section 7 or 8 and is also

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[32] *San Diego Building Trades Council* v. *Garmon,* 359 U. S. at 243.

[33] *Vaca* v. *Sipes,* 386 U. S. 171, 179.

[34] 359 U. S. at 244, and also recognized as a separate test in *Linn* v. *United Plant Gaurd Workers,* 383 U. S. at 62-63.

a "merely peripheral concern" of the Act.[35] These arguments of Respondents, therefore, need not be emphasized again. Rather, the main thrust here will be that the valid state policies enforced by the court below touch interests deeply rooted in local responsibility and affect matters of compelling state concern. Accordingly, this area of traditional state regulation should not be deemed one in which state jurisdiction must yield.

This Court has repeatedly recognized that there is an "overriding state interest . . . involved in the maintenance of domestic peace." *Plumbers Union* v. *Borden,* 373 U.S. 690, 693. As stated by the Court in *Garmon*:

> ". . . we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and *imminent*

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[35] Cf. Organizing And The Law, A Handbook For Union Organizers, by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), 1967, at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so *without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. There is, however, *no section of the Taft-Hartley Act available to the employer in this situation.*" (Italics added.)

The "exceptional circumstances" referred to include entry on shopping center property based on *Amalgamated Clothing Workers* v. *Wonderland Shopping Center, supra,* n. 5, where in the factual situation there involved, there was held to be no trespass under Michigan law.

> *threats to the public order.* United Automobile Workers v. Russell, 356 U.S. 634. United Construction Workers v. Laburnum Corp., 347 U.S. 656. We have also allowed the States to enjoin such conduct. Youngdahl v. Rainfair, 355 U.S. 131; Auto Workers v. Wisconsin Board, 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." 359 U.S. at 247. (Italics supplied.)

More recently, in *Linn,* this Court noted that, in the area of libel suits, the alternative to the exercise of state power was a serious threat to the maintenance of domestic peace:

> ". . . the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized." 383 U.S. at 64, n. 6.

The Court, therefore, concluded that the states' concern was " 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon.*" (p. 62).

The function of trespass actions in maintaining the public order is no different. The substantial number of cases in which states have regulated unauthorized invasions of property reflects the deep concern and traditional responsibility of the states in this area.[36] The state's "duty," as recognized by the court below, is not only imposed to "preserve the property rights of its citizens";[37] of even greater significance, it is also exercised to "protect . . . its citizens," 425 Pa. at 386, 227 A. 2d at 876-7

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[36] See Section I of this Argument at pp. 7-10 *supra.*

[37] See *Adderley* v. *Florida,* 385 U. S. at 47.

(1967). The alternative to the use of state power in this area is, as in the case of libel suits, self help and a concommitant imminent threat of violence. "The basic purpose of the [trespass] statute is the prevention of violence or threats of violence." *People* v. *Goduto,* 21 Ill. 2d 605, 609, 174 N.E. 2d 385, 387 (1961), *cert. den.* 368 U.S. 927. "Intimidation and threats of violence", no less than actual violence, affect "such compelling state interest as to permit the exercise of state jurisdiction."[38] A finding of exclusive Board jurisdiction, and a resulting displacement of state power, would result in a regulatory vacuum in the present case closely coincident to that described by the Court in *United Auto, A. & A.I.W.* v. *Wisconsin Emp. Rel. Bd.,* 351 U.S. 266, 274-5:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

As in *International Association of Machinists* v. *Gonzales,* 356 U.S. 617, 620, "[s]uch a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national labor policy, [should] require a more compelling indication of congressional will than can be found in the interstices of the . . . Act." Moreover, there is no inconsistency between any overriding federal labor policy and a state reasonably applying its state policies with respect to trespass. As in *Linn,* state action

[38] See *Linn* v. *United Plant Guard Workers,* 383 U. S. at 62.

would "reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy." 383 U.S. at 64.[39]

The Board, as *amicus*, recognized that "a state has a legitimate interest in protecting private property against trespass" and conceded that if entry had been made upon the selling area of the Weis store, the interest of the State would be "so great and the danger of interference with the federal regulatory scheme . . . so slight, that the State would not be barred from acting."[40] The difference between that situation and the instant one is explained only on the basis that, in the former instance, the state is protecting its citizens against unwarranted intruders, but, in the latter case, the protection afforded is "only" against economic injury. This distinction begs the question. In both cases presumably the intruders are unwanted, and in both cases presumably the union's entry was for the purpose of bringing about economic injury. The appropriate issue, therefore, is not where the line of trespass is to be drawn, but, rather, may the state draw it at all. In either case, to deny the state the power to determine and enforce its own valid state powers, and prevent imminent violence, would result in a rejection of the principle that a state may properly regulate conduct which touches interests deeply-rooted in local feelings and responsibility.

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[39] As this Court observed in *Hanna Mining Co.* v. *District 2, MEBA*, 382 U. S. 181, 191, n. 13, ". . . sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province."

[40] Brief of NLRB, p. 17.

CONCLUSION

For the above-stated reasons, as well as those set forth by the Respondents, the decision of the court below should be affirmed.

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No. 478

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMALGAMATED FOOD EMPLOYEES UNION
LOCAL 590, *et al.*,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS

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INDEX

	PAGE
Question Presented	1
Statement of the Case	2
Summary of Argument	6
POINT I—	
THE UNION'S PICKETING WAS SUBJECT TO REASONABLE REGULATION	15
POINT II—	
THIS COURT WILL SUSTAIN STATE COURT INJUNCTIONS EFFECTUATING STATE PUBLIC POLICY	18
POINT III—	
THE BALANCE STRUCK HERE BY THE COMMONWEALTH OF PENNSYLVANIA SHOULD BE ACCORDED A "WEIGHTY TITLE OF RESPECT" AND ITS JUDGMENT AFFIRMED	21
POINT IV—	
THIS COURT RECOGNIZES THAT DIVERGENT SOCIAL AND ECONOMIC VIEWS HELD BY STATES MAY RESULT IN THEIR STRIKING DIFFERENT BALANCES	25
POINT V—	
THE NARROWLY DRAWN INJUNCTION HEREIN IS VALID UNDER THE FEDERAL CONSTITUTION	27

PAGE

POINT VI—

THE UNION'S FEDERAL PREEMPTION DEFENSE WAS NEITHER RAISED NOR ARGUED BEFORE THE SUPREME COURT OF PENNSYLVANIA; THEREFORE, THIS DEFENSE MAY NOT BE RAISED HERE 29

A. This Court Will Not Entertain Defenses That Were Not Raised Before A State Supreme Court 29

B. The Defense Of Federal Preemption Was Never Presented To The Supreme Court Of Pennsylvania For Its Determination, Nor Did That Court Address Itself To The Question 30

1. The Rules of the Supreme Court of Pennsylvania require that questions be properly presented 30

2. The defense of federal preemption was not included in the union's statement of questions involved 31

3. The defense of federal preemption was not argued before the Supreme Court of Pennsylvania 33

4. The defense of federal preemption was not argued before the trial court 34

5. The Supreme Court of Pennsylvania has decided questions of federal preemption when properly raised 35

C. Since The Union Failed To Raise The Defense Of Federal Preemption Before The Supreme Court Of Pennsylvania, It May Not Be Raised Before This Court 37

PAGE

POINT VII—

ASSUMING, ARGUENDO, THAT PREEMPTION MAY BE RAISED BEFORE THIS COURT, THE SUPREME COURT OF PENNSYLVANIA IS NOT PREEMPTED IN THE CIRCUMSTANCES OF THE INSTANT CASE 39

A. The Picketing Did Not Violate Any Section Of The Labor Management Relations Act 39

1. The complaint did not allege that the union had engaged in unfair labor practices 39

2. The union's Motion to Dissolve did not specify any particular unfair labor practice 39

3. The asserted unfair labor practices are confined to two sections of the Act 40

B. Many Areas Of Labor Activity Remain Subject To State Regulation 46

1. State court action for libel published during union organizing compaign 47

2. State court action by employees for malicious interference with lawful occupation 47

3. State court action by employee for wrongful expulsion from union membership 47

4. State action prohibiting mass picketing and interference with free use of public streets and sidewalks 48

5. State court regulation of organizational picketing directed toward supervisors 48

PAGE

6. State court action by employee alleging breach of union duty of fair representation 49

7. State Board action based on violence 49

8. State court action based on violence 49

9. State court action by employee against employer for breach of union contract 50

C. Pennsylvania's Deeply Rooted Interest In Protecting The Property Of Its Citizens Should Not Be Abrogated 51

D. There Was No Transgression Upon The National Labor Policy 54

E. Pennsylvania Should Be Permitted To Exercise Its Inherent Equity Powers 56

CONCLUSION 59

Table of Authorities

Citations

Cases:

PAGE

Adderley v. Florida, 385 U.S. 39 ..... 23, 52
Allen-Bradley Local 1111, United Electrical Workers v. WERB, 315 U.S. 740 ..... 9, 38, 41, 48, 56
Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 ..... 28, 37, 52
Associated Press v. NLRB, 301 U.S. 103 9

Bakery Drivers Local 802, IBT v. Wohl, 315 U.S. 769 ..... 12, 15, 18
Beck v. Washington, 369 U.S. 541 ..... 29, 32, 38
Blair v. Oesterlein Co., 275 U.S. 220 29
Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mut. Ins. Co., 385 Pa. 394, 123 A. 2d 413 31
Breard v. Alexandria, 341 U.S. 622 18
Building Service Employees Union v. Gazzam, 339 U.S. 532 ..... 15, 19, 25, 27

Capeton v. Bowyer, 14 Wall. 216 33
Carey v. Westinghouse Corp., 375 U.S. 261 37
Carlson v. California, 310 U.S. 106 18
Carpenters Union v. Ritter's Cafe, 315 U.S. 722 ..... 18, 19, 25
Chandler v. Manifold, 290 U.S. 665 33
Charleston Assn. v. Alderson, 324 U.S. 182 33
CIO v. McAdory, 325 U.S. 472 32
City Line Open Hearth, Inc. v. Hotel Employees Union, 413 Pa. 420, 197 A. 2d 614 35
Commonwealth v. Cauffiel, 298 Pa. 319, 148 Atl. 311 31
Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133, affirmed 350 U.S. 497 36

Division 1287, Bus Employees Ass'n v. Missouri, 374 U.S. 74 37

PAGE

Dorrance v. Pennsylvania, 287 U.S. 660 33
Dunmore v. McMillan, 396 Pa. 472, 152 A. 2d 708 30

Flournoy v. Wiener, 321 U.S. 253 33
Freeman v. Retail Clerks Union, 58 Wash. 2d 426, 363 P. 2d 803 53

Giboney v. Empire Storage Ice Co., 336 U.S. 490 ....18, 19, 25
Gimbel Bros., Inc., 100 N.L.R.B. 870 53
Good v. Dow Chemical Co., 247 S.W. 2d 608, cert. denied, 344 U.S. 805 17
Guss v. Utah Labor Bd., 353 U.S. 1 37

Hanna Mining Co. v. District 2, Marine Engineers Ass'n, 382 U.S. 181 ..... 14, 37, 48, 55
Hattiesburg Bldg. & Trades Council v. Broome Co., 377 U.S. 126 37
Honolulu Typographical Union No. 37 (Hawaii Press Newspapers), 167 N.L.R.B. No. 150 42
Houston Bldg. & Construction Trades Council (Claude Everett Construction Co.), 136 N.L.R.B. 321 45
Hughes v. Superior Court, 339 U.S. 460 ..... 15, 18, 19, 25, 26
Hulbert v. Chicago, 202 U.S. 275 33

International Ass'n of Machinists v. Gonzales, 356 U.S. 617 ..... 14, 46, 47
International Bhd. of Teamsters v. Hanke, 339 U.S. 470 ..... 13, 15, 19, 20, 21, 22
International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 ..... 13, 18, 19, 22, 38
International Hod Carriers, Local 840 (C.A. Blinne Const. Co.), 135 N.L.R.B. 1153 44
International Union, UAW v. Russell, 356 U.S. 634 ..... 47, 55, 56
International Union, UAW v. WERB, 336 U.S. 245 59

PAGE

Kerr v. O'Donovon, 389 Pa. 614, 134 A. 2d 213 31
Kuhns v. Brugger, 390 Pa. 331, 135 A. 2d 395 30

Lay v. Local 174, International Bhd. of Electrical Workers, 427 Pa. 387, 235 A. 2d 402 ..... 35, 36
Liner v. Jafco, Inc., 375 U.S. 301 37
Linn v. United Plant Guard Workers, 383 U.S. 53 ..... 47, 54, 58
Local 438, Construction Union v. Curry, 371 U.S. 542 37
Local 100, Plumbers' Union v. Borden, 373 U.S. 690 ..... 37, 40, 46

Marine Engineers Ass'n v. Interlake Steamship Co., 370 U.S. 173 37
Marsh v. Alabama, 326 U.S. 501 11
Milk Wagon Drivers Union v. Meadowmoore Dairies, Inc., 312 U.S. 287 ..... 19, 25, 27

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 13
NLRB v. Fruit & Vegetable Packers, 377 U.S. 58 15
NLRB v. Suffolk County District Council of Carpenters, Docket Nos. 31151, 31152, 2d Cir., December 13, 1967 45

People v. Goduto, 21 Ill. 2d 605, 174 N.E. 2d 385, 387, cert. denied, 368 U.S. 927 58
Plumbers' Union v. County of Door, 359 U.S. 354 37

Safeway Stores v. Oklahoma Grocers, 360 U.S. 334 29
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 ..... 37, 46
Schwartz-Torrance Investment Corp. v. Bakery Workers Union, 61 Cal. 2d 766, 394 P. 2d 921, cert. denied, 380 U.S. 906 ..... 25, 26
Smith v. Evening News Ass'n, 371 U.S. 195 ..... 37, 50
Snyder Estate, 346 Pa. 615, 31 A. 2d 132, cert. denied, 320 U.S. 750, rehearing denied, 320 U.S. 812 31

PAGE

State v. Martin, 199 La. 39, 5 So. 2d 377 17
State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154 ....29, 38

Teamsters Union v. Morton, 377 U.S. 252 55
Thornhill v. Alabama, 310 U.S. 88 .....18, 51

UAW v. WERB, 351 U.S. 266 .....38, 48, 49
United Construction Workers v. Laburnum, 347 U.S. 656 .....50, 57

Vaca v. Sipes, 386 U.S. 171 .....37, 49, 57

Weber v. Anheuser-Busch, Inc., 348 U.S. 468 55
Whitney v. California, 274 U.S. 357 29
Wilson v. Cook, 327 U.S. 474 29
Wolfe v. North Carolina, 364 U.S. 177, rehearing denied, 364 U.S. 856 .....33, 38

Youngdahl v. Rainfair, Inc., 355 U.S. 131 .....38, 56

Statutes:

National Labor Relations Act, as amended (61 Stat. 316, 29 U.S.C. § 141, et seq.) 40, 41, 42, 54

Miscellaneous:

3 American Law of Property, § 12.132 (1952) 23

43 C.J.S. *Injunctions*, § 64 (1945) 52

Currier, *Defamation in Labor Disputes: Preemption And The New Federal Common Law*, 53 Va. L. Rev. 1 (1967) 54

Rules of the Supreme Court of Pennsylvania (as amended to January 1, 1967) 30, 32, 33

4 Tiffany, Real Property, § 1089 (3rd ed., 1939) 23

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BRIEF FOR RESPONDENTS

Question Presented

It is the public policy of the Commonwealth of Pennsylvania that peaceful picketing on a retailer's private property, within a shopping center, is a trespass. The Supreme Court of Pennsylvania, in declaring this policy, affirmed a preliminary injunction regulating such picketing. The question presented is whether, under these circumstances, the Petitioners' freedom of speech was abridged.

Statement of the Case

Weis Markets, Inc. (Weis) is the owner-occupant of a supermarket in the shopping center known as Logan Valley Plaza, Inc. (Logan). Weis owned the real property on which it constructed its store, porch and parcel pick-up zone, and has retained ownership in this property. Logan owns all other property in the shopping center (R. 9, 42, 51, 52).

The only other occupant of the shopping center at the commencement of this proceeding was a Sears, Roebuck store and service station (R. 51). Construction of other stores was contemplated (R. 51). The plaza is located at Altoona, Pennsylvania, within the intersection of public highways known as Plank Road (U.S. Route 220) to the east, and Goods Lane to the south (R. 87). The main entrances used by customers of Weis are Entrances 1 and 2 off of Goods Lane (R. 49, 50; see photograph, Ex. No. 1, R. 80). The distance between the store and these two entrances is 350 feet (R. 35).

On December 8, 1965, Weis opened for business. It posted a sign on its property prohibiting trespassing or soliciting on its property (R. 33, 49).

On December 17, 1965, picketing was commenced by Petitioners (hereinafter referred to as the union) "directly in front of the (Weis) store," (R. 54, 55) and continued daily (except December 24, 1965) until December 27, 1965 (R. 28, 29, 31, 32), when it was enjoined.

The pickets paraded within Weis' parcel pick-up zone. This zone is located alongside the front of the store; it is four to five feet wide, 30-40 feet in length, and is marked

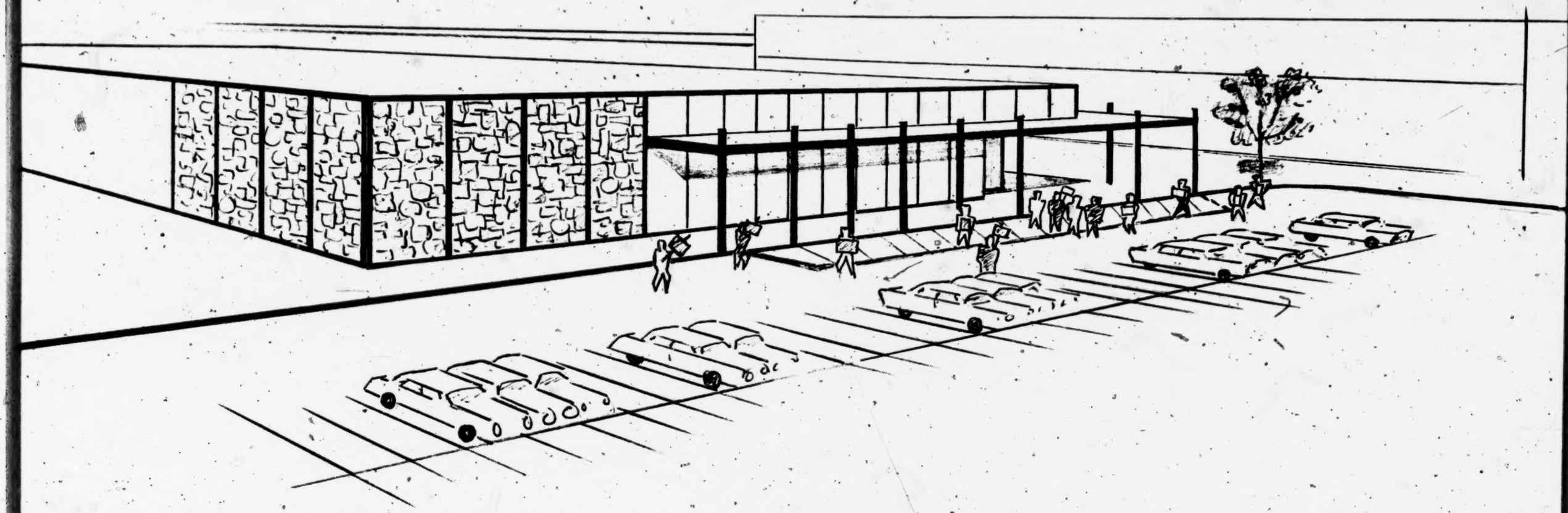
off with bold double yellow lines (R. 101, n.2, 55).[1] The words "Parcel Pick-Up" are printed in large letters. (See Photographs R. 84, 85.) *This zone is Weis property and is owned by Weis*, together with the store proper and porch adjacent thereto (R. 9; Order of Court, par. (a), R. 20; R. 33, 41, 42, 52, 101).

The pick-up area is used "strictly for customers to come and enter to pick up their parcels which they had purchased. . . . They drive (their automobiles) into this particular area, and there the groceries are loaded into the cars by (Weis employees) on . . . pick-up duty" (R. 29).

December 17th was a Friday. A witness described what occurred:

> "(I)t was a Friday night, which is quite busy." Cars were moving continuously in the vicinity of the parcel pick-up zone (R. 29).
>
> • • •
>
> The picketing was "causing congestion out there (in the parcel pick-up zone) and customers were milling around trying to get in as well as leave. After they had the groceries loaded in the car they had a problem of waiting until some of the pickets stepped out of the way (so) that they could leave the zone" (R. 30).
>
> • • •
>
> This required "constant navigating by customers in and out. . . ." One customer stated she had almost hit one of the pickets (R. 44).
>
> • • •
>
> The picketing took place "right where the cars will drive in for the groceries." The pickets "hindered"

[1] The Exhibits in the Appendix do not clearly or completely depict this area. A schematic, based upon the record in this case, follows this page.



PARCEL PICK-UP ZONE

4-5' x 30-40'

the cars from driving in, causing annoyance to the customers (R. 47).

The number of pickets varied from 4 to 13 (R. 102). During the afternoon of December 21st, "13 were there . . . walking four abreast many times" (R. 47). None of the pickets were employees of Weis (R. 38, 89). Twelve of the pickets were employed at three A & P stores in the area, two were employed at the Acme store, and one at the Quaker store (R. 66, 67).

The avowed purpose of the picketing was to inform the public that the employees of Weis at this store were not members of its union (R. 23, 29, 54). It was testified that "Weis Markets (was not) involved in a labor dispute" with the union (R. 37) and the trial court found that "the Weis supermarket is not engaged in labor trouble" (R. 92).

Weis' Assistant General Superintendent advised the pickets that they were picketing on private property. He called their attention to the no-trespassing sign, and requested that they picket on the berms of the road. The berms separate the parking lot from the respective highways, and are approximately 12 and 15 feet in width (R. 35, 37, 101). The pickets refused (R. 32, 33).

Thereupon, on December 27, 1965, Logan and Weis filed a complaint with the Court of Common Pleas of Blair County, Pennsylvania (hereinafter referred to as the trial court). The court on the same date issued an injunction restricting the picketing to the public berms (R. 19-21, 102, n. 4).

Thereafter, the picketing continued on the berms at each of four entrances to the shopping center (R. 32, 39, 64), with one or two pickets at each entrance, depending on the number available to picket (R. 62). In addition to

picketing on the berms, the pickets also picketed across the driveway of the entrances and exits leading to the general parking area (R. 75).

On January 4, 1966, a hearing was held at which testimony was taken (R. 27). On February 16, 1966, the trial court ordered that the preliminary injunction theretofore issued be "continued until further adjudication of the case" (R. 4). On March 21, 1967, the Supreme Court of Pennsylvania affirmed (R. 5, 106). On October 23, 1967, this Court granted certiorari.

Summary of Argument

The issue is simple. A retailer builds his own store on his own land in a shopping center. On his property, he provides a parcel pick-up area for use by his customers. A union seeks to picket him. Must the retailer suffer the conversion of the *pick-up* area to a *picket* area?

This simple issue is before this Court as a result of an Order of the trial court, issued after a full hearing (R. 99, 100).

The Supreme Court of Pennsylvania, in affirming the trial court, summarized the Order's prohibitory aspects as follows:

"That injunction restrained the Union from:

1. picketing and trespassing on Weis' property, i.e., the store proper, the porch and the parcel pick-up area;
2. picketing and trespassing upon Logan's property, i.e., the parking area and entrances and exits thereto;
3. physically interfering with Weis' business invitees entering or leaving the store or parking area;

4. violence toward Weis' business invitees;

5. interference with Weis' employees in the performance of their duties" (R. 102).

The union's position, in the courts below, and here, may be ascertained from what it has stated, as well as what it has left unsaid.

Activity Restrained	*Union's Position on Restraint*
(1) Picketing	
a. inside the store	No expressed disagreement
b. on the porch	No expressed disagreement
c. within the parcel pick-up area	Expressed disagreement
(2) Picketing	
a. in the parking area	Expressed disagreement
b. on the entrances and exits to parking area	Expressed disagreement[2]
(3) and (4) Physical interference with and violence toward Weis' business invitees	No expressed disagreement
(5) Interference with Weis' employees	No expressed disagreement

[2] However, the union interpreted the court's order to permit picketing across the driveways of the entrances and exits (R. 77-78). Accordingly, the union instructed its pickets to walk across these driveways (R. 75). This interpretation and instruction were not objected to. Consequently, the court's restraint in (2)b was never enforced.

Picketing Inside the Store

The union has not expressed disagreement with the trial court's injunction against picketing inside Weis' store. It has not commented, either affirmatively or negatively. The National Labor Relations Board has. In its *amicus* brief, it stated:

> "Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. . . . (T)he State would not be barred from acting. . . ." (Brief, p. 17.)

Picketing On the Porch

The union has not expressed disagreement with the statement of the Supreme Court of Pennsylvania that they "do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5).

Picketing In the Parking Area

It is uncontroverted that no picketing took place in the general parking area. Although the union expressed disagreement with the trial court's barring it from engaging in picketing in the general parking area, if it chose to do so in the future, *the union at no time suggested this area as an alternative to picketing within the parcel pick-up zone.* Its position was that it should be permitted to continue to picket "at the Weis Market area" (R. 53).

The Question To Be Decided

Thus, stripped of all rhetoric, the narrow issue is simply this: "(I)n the factual matrix of the case at bar" (R. 104) should the trial court be prohibited from reasonably regulating picketing which occurred within Weis' wholly-owned parcel pick-up zone?

Questions Not Before This Court

Thus, this Court is not asked to decide whether, under any and all circumstances, a state court may regulate picketing within a shopping center.[3] Nor is it necessary in this case to decide whether picketing in the general parking area of a shopping center is subject to regulation, for none took place. It is respectfully submitted that this case of first impression calls for a narrow decision based squarely on the narrow issue tendered.

In the light of the *amici* briefs filed by the American Civil Liberties Union, the Retail Clerks International Association, and the American Federation of Labor and Congress of Industrial Organizations, it is important to further clarify what is *not* at issue in this case.

The *American Civil Liberties Union* argues in support of "the union man fighting for the right to bargain collectively . . . the Negro fighting for a job . . . the housewife fighting an inexplicable rise in the price of eggs. . . ." (Brief, p. 8.) But, of course, the rights of such disputants are not in issue in this case. This Court only "deal(s) with concrete and specific issues raised by actual cases . . . not with . . . theoretical disputes." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 746. Additionally, "courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press* v. *NLRB,* 301 U.S. 103, 132.

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[3] An attempt to do so would present insuperable problems. The size, shape, structure, depth, and height of present day shopping centers vary. No two are alike. (See the *amicus* brief of R.C.I.A., p. 5: "Shopping centers vary in size. The shopping center in the instant case has 17 stores. . . . Many shopping centers have paved streets, traffic signs and traffic lights, (and) sidewalks. . . .") *What may be reasonable regulation of picketing in one case may be unreasonable in another.*

The *Retail Clerks International Association* argues that "it is . . . concerned about the right of *unorganized* (emphasis in original) workers in shopping centers to receive information from unions. . . ." (Brief, p. 3.) It asserts that "the instant case is typical" of a situation where a union seeks access to privately-owned shopping centers "to communicate with employees." (Brief, p. 9.)

The right of unions to communicate with employees, organized or unorganized, is not in issue here. Repeatedly, the union in this case has asserted that the picketing was directed toward members of the public (actual or prospective Weis customers), rather than to Weis' employees (See *infra*, pp. 43-44).

The *American Federation of Labor and Congress of Industrial Organizations* opens its argument with the statement that "in the instant case the Pennsylvania courts have used the State's trespass laws to . . . immunize (Weis) . . . from peaceful picketing and handbilling. . . ." (Brief, p. 2.) It then discusses this Court's decisions involving handbilling, acknowledging, however, ten pages later, that *"this case involves dissemination of views to the general public through placards held aloft, i.e. picketing,* and the cases just discussed dealt with the circulation of handbills." (Brief, p. 11.) (Emphasis added.)

Of course this latter statement was correct, and the opening statement incorrect. The trial court did not regulate handbilling. At the time of the filing of this suit the only activity engaged in by the union was picketing.[4] Consequently, the only relief sought and the only relief

[4] This point was made by the union in its brief to the Supreme Court of Pennsylvania: "We would also respectfully point out that the only testimony in the record with regard to handbills is found at page 58a where it is made clear that no literature was passed out to the public by the pickets while they were picketing within the shopping center area, in fact, the handbill referred to by the lower court was not, as we recall,

granted involved picketing. The question of handbilling is not before this Court.[5]

The Narrow Issue to be Decided—
Picketing in the Pick-Up Zone

Thus, we return to the narrow issue of whether this union must be permitted to picket within Weis' parcel pick-up zone. The union claims this right because of its asserted effectiveness in conveying its message to the public. This is a matter of conjecture. But it is not conjectural that the union effectively disrupted Weis' business when its thirteen pickets marched four abreast in the pick-up zone.

The National Labor Relations Board concedes that had the picketing taken place within the selling area of the Weis store, disrupting its business, it could have been enjoined by the State. There is no less a disruption of business when pickets interfere with the entrance of customers into the pick-up zone, interfere with the placing of purchased merchandise in automobiles, and interfere with the exit of customers from the zone.

The duties of Weis' employees require them to work in the parcel pick-up zone, loading merchandise into the customers' automobiles (R. 29). The interference of the pickets with these duties was as much a disruption of business

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even introduced into evidence." (Brief for Appellants, p. 13, a copy of which was lodged with this Court on November 20, 1967; to the same effect, see Brief for Petitioners, p. 7.)

[5] Similarly, the AFL-CIO's reliance on *Marsh* v. *Alabama*, 326 U.S. 501, is inapplicable. As its *amicus* brief notes at p. 8, the *Marsh* case "dealt with the power of a state to apply its trespass law to prohibit *handbilling* on a street in a company owned town. . . ." (Emphasis added.) Furthermore, there are numerous distinctions between a company owned town and the shopping center in this case. One obvious distinction is that the owners of a company town, unlike the owners of a shopping center, can regulate the full spectrum of human activity, since the inhabitants of the town may never have occasion to leave it.

as interference with the performance of their duties within the store. In fact, it was this very interference which the trial court enjoined, namely:

> "(f) Physically interfering with . . . the plaintiffs employees from performing their duties . . ." (R. 21).

Incontrovertibly, Weis' business was disrupted when the thirteen pickets "caused congestion" and "milling around by customers who were trying to get in as well as leave" (R. 30).

Its business was disrupted when the pickets, "marching abreast," (R. 32) "hindered" automobiles and "annoyed" customers (R. 47).

Its business was disrupted when the pickets forced customers to "navigate in and out" to avoid hitting them (R. 44).

By December 27th, a crisis had been reached. Weis' predicament had become intolerable. If its newly opened store were to remain open, it had to seek immediate relief.

The Law

We submit that the trial court acted in the proper exercise of its equity jurisdiction. The Commonwealth of Pennsylvania should not be foreclosed from fulfilling its obligation to protect the private property and business of its citizens.

There can be no doubt that "a state is not required to tolerate in all places and all circumstances even peaceful picketing . . .," *Bakery Drivers Local 802, IBT* v. *Wohl*, 315 U.S. 769, 775 (concurring opinion), and that a state may enjoin peaceful picketing in enforcement of its public policy. Certainly, state power to "constitutionally enjoin

peaceful picketing . . .," *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284, 293, was not abused by the issuance of the narrowly drawn injunction *allowing picketing,* but prohibiting it from a particular area.

This Court's primary concern in reviewing a state court injunction is to determine whether a proper balance has been struck between competing interests. *International Bhd. of Teamsters* v. *Vogt, Inc., supra* at 289-90. The trial court recognized that "we do not have the right totally to prohibit the picketing of Weis supermarket . . ." (R. 96). However, the court correctly believed that it was "invested with authority to balance the equitable considerations and to impose reasonable controls . . ." (R. 96). The balance struck by Pennsylvania in the instant matter is eminently sound. The pickets were not directed to cease their activity, but merely to move it a relatively short distance away.

The trial court's balancing of the equities in the instant matter was an exercise of reasonable regulation and entitled to "weighty respect." In exercising such authority President Judge Klepser was able to draw upon his "knowledge and appraisal of local, social and economic factors," *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 475, and his personal knowledge of the physical characteristics of the area (R. 50). The result was a narrowly drawn injunction, which permitted picketing at a readily available alternative area. *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112.

The union argues, however, that the trial court was without jurisdiction to act because it was preempted. The union's claim of federal preemption was neither raised nor argued before the Pennsylvania Supreme Court and therefore, under this Court's holdings, this defense may not be raised here.

Assuming, arguendo, that the federal preemption question was not waived, the issue before this Court is whether this state court is preempted from reasonable regulation of picketing upon private property in the circumstances of *this case.* Within the narrow framework of the case at bar, the Pennsylvania courts were not preempted from exercising control. The complained of activity was not even arguably subject to the Labor Management Relations Act. Weis and Logan did not allege in their complaint that the union's activity was subject to the Act, and the union has failed to show that it was.

It is clear that there are many areas of labor activity which remain subject to state regulation. This Court has indicated that much is left to the states. *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 619. The conduct in the instant matter is "deeply rooted in local feeling and responsibility" and therefore within the area subject to state regulation. In the instant matter, the Supreme Court of Pennsylvania expressed the Commonwealth's deeply rooted state interest in the preservation of private property.

Clearly, there was no transgression by Pennsylvania upon the national labor policy, as the conduct controlled by the lower court in the instant matter was merely conduct which "finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193, n. 14.

Under the facts of the instant case it cannot be argued that Congress intended this activity to be within the exclusive jurisdiction of the National Labor Relations Board. The judgment of the Supreme Court of Pennsylvania, therefore, should be affirmed.

POINT I

THE UNION'S PICKETING WAS SUBJECT TO REASONABLE REGULATION.

What is picketing? Is it speech, pure and simple? This Court has often considered this question, and has answered that "picketing (is) not .... the equivalent of speech. . . ." *Hughes* v. *Superior Court,* 339 U.S. 460, 465. It "is more than speech. . . ." *Building Service Employees Union* v. *Gazzam,* 339 U.S. 532, 537; *Bakery Drivers Local 802, IBT* v. *Wohl,* 315 U.S. 769, 776 (concurring opinion). It "cannot dogmatically be equated with . . . freedom of speech. . . . (It) is 'indeed a hybrid.'" *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 474.

"'Picketing,' in common parlance . . . includes at least two concepts: (1) *patrolling,* that is, standing or marching back and forth or round and round . . . (2) *speech,* that is, arguments, usually on a placard. . . ." *NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 77 (concurring opinion). (Emphasis added.)

"*(P)atrolling is, of course, conduct, not speech,* and therefore is not directly protected by the First Amendment." Mr. Justice Black concurring in *NLRB* v. *Fruit & Vegetable Packers, supra* at 77. (Emphasis added.)

In the present case the "conduct" of the pickets warranted regulation. As the record shows, picketing was carried on to such an extent that the orderly operation of the Weis business became an impossibility.

The parcel pick-up area is an essential operation of Weis' business. It is set apart for use by Weis' customers;

entrance by other vehicles is prohibited.[6] It has great customer appeal. Most of Weis' customers come to the center by car. After completing his purchase, the customer drives his car into the parcel pick-up zone and an employee loads the merchandise into the car. Thus, within seconds, packages may be taken from the store and loaded into the customers' cars. Customers are relieved of the burden of carrying heavy loads of groceries to a car parked some distance away.

The parcel pick-up area is an adjunct to the store. This parcel pick-up zone is actually part of the merchandising of the product. Its operation is as much an integral part of the store's operations as the stocking of the shelves, or the payment for purchases at the check-out counters. It is the place of last impression upon a customer; efficient handling of his purchases enhances the likelihood that he will return.

But on Friday evening, December 17th, the normally smooth functioning and efficient merchandising operation within the zone was disrupted by marching pickets, and its use significantly curtailed. Packages could not be loaded into vehicles; automobiles could not proceed through the area; pickets, employees and customers were placed in danger of bodily harm; and vehicles were abnormally backed-up for some distance awaiting service. All of this was a consequence of the "conduct" of the union's picketing. It was this "conduct" which required regulation. In doing so, the trial court preserved the "speech" aspects of the picketing by permitting its continuation at the berms.

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[6] The enforcement of this prohibition was illustrated when an A & P store manager sought to interfere with the ordinary functioning of this zone by parking and leaving his car there. The Weis employees working in the parcel pick-up area reported this to their supervisor, claiming that "Our pick-up zone is completely halted." The A & P manager was requested to remove his car immediately so that the zone could be reopened to customers (R. 30).

Thus, the "speech" element of the picketing remained unimpaired. Eight pickets continued to communicate their message to the public at the entrances to the shopping center (R. 62). And, as "the placards . . . (were) plainly legible to passing motorists" (R. 98), not a person could enter the shopping center without being aware of the message. The trial court concluded that, as a result, the union's audience was increased (R. 98).[7]

In addition, as stated in Brief for Petitioners, p. 7, "when picketing at the highway entrances began, leaflet distribution at these points was also commenced (R. 58-59)." Hence, the union's media of communication was further expanded. Its "freedom of speech" was not abridged; it was enlarged.

The union's claim that its sole objective was communication with the public, rather than interference with the store's operations, is belied by its actions. If its purpose was communication alone, one picket, with sandwich placards in front and back, would have been sufficient. Every prospective customer would have been communicated with. The physical presence of 13 pickets, marching four abreast, evidences the union's intention to disrupt Weis' business.

The claim of abridgment of constitutional rights should not be used as a shield for transgression of another's property rights. The law will not "sanction trespass in the name of freedom."[8]

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[7] This may be the reason why some unions always picket at the entrances to shopping centers.

[8] "(F)reedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin." *State* v. *Martin*, 199 La. 39, 48, 5 So. 2d 377, 380; quoted in *Good* v. *Dow Chemical Co.*, 247 S.W. 2d 608, 611, *cert. denied*, 344 U.S. 805.

POINT II

THIS COURT WILL SUSTAIN STATE COURT INJUNCTIONS EFFECTUATING STATE PUBLIC POLICY.

This Court will sustain state court injunctions against peaceful picketing, where the state acts in enforcement of its public policy. There is "a broad field" in which the state can "constitutionally enjoin peaceful picketing" in enforcing its policy, *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293, for "a state is not required to tolerate in all places and all circumstances even peaceful picketing." *Bakery Drivers Local 802, IBT* v. *Wohl*, 315 U.S. 769, 775 (concurring opinion).

This Court has emphatically rejected the claim that the "states (are) powerless to confine the use of this industrial weapon (peaceful picketing) within reasonable bounds."[9] *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722, 725. On the contrary, "where . . . claims on behalf of free speech are met with claims on behalf of . . . the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain." *Carpenters Union* v. *Ritter's Cafe, supra* at 725-26. It will uphold such regulation where "the manner in which picketing is conducted . . . gives ground for its disallowance," *Hughes* v. *Superior Court*, 339 U.S. at 465-66, for "freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses." *Breard* v. *Alexandria*,

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[9] As this Court noted in *Giboney* v. *Empire Storage Ice Co.*, 336 U.S. 490, 498: "Neither *Thornhill* v. *Alabama, supra*, nor *Carlson* v. *California*, 310 U.S. 106, both decided on the same day, supports the contention that conduct otherwise unlawful is always immune from state regulation because an integral part of that conduct is carried out by a display of placards by peaceful pickets."

341 U.S. 622, 642. "The Constitution does not demand that the element of communication in picketing prevail . . ." over a state's public policy. *Hughes* v. *Superior Court,* 339 U.S. at 464.

This Court's primary concern in reviewing a state court injunction enforcing public policy is not so much a question of free speech, as a review of the balance struck by a state between picketing and competing interests of state policy. *International Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284.

In reviewing the balance struck by the state, this Court will not judge the wisdom of the state policy, *Building Service Employees Union* v. *Gazzam,* 339 U.S. 532, 536-37; *Giboney* v. *Empire Storage Ice Co.,* 336 U.S. 490; *Carpenters Union* v. *Ritter's Cafe,* 315 U.S. 722, 725; nor the wisdom of its exercise. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287, 298.

In *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 477, this Court reaffirmed this rule:

> "Washington here concluded that, even though the (injunction) . . . entailed restrictions upon communication that the unions sought to convey through picketing, it was more important to safeguard the value which the State placed upon self employers, leaving all other channels of communication open to the union."
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> • • •
>
> "It is not our business even remotely to hint at agreement or disagreement with what has commended itself to the State of Washington, or even to intimate that all the relevant considerations are exposed in the conclusions reached by the Washington Court. They seldom are in this field, so deceptive and opaque are the elements of these problems. That is precisely what is

meant by recognizing that they are within the domain of a State's public policy." 339 U.S. at 478.

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"*(A) State's judgment in striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to the Court bearing a weighty title of respect.*" 339 U.S. at 475. (Emphasis added.)

POINT III

THE BALANCE STRUCK HERE BY THE COMMONWEALTH OF PENNSYLVANIA SHOULD BE ACCORDED A "WEIGHTY TITLE OF RESPECT" AND ITS JUDGMENT AFFIRMED.

We start with the decision of the trial court. Did it follow this Court's teachings concerning the balancing of the interests of the parties and the exercise of reasonable regulation? Judge Klepser did just that when he said, speaking for the court:

> "(W)e are invested with authority to *balance the equitable considerations* and to impose *reasonable controls* . . ." (R. 96). (Emphasis added.)

In exercising such authority, Judge Klepser was able to draw upon his "knowledge and appraisal of local social and economic factors," *International Bhd. of Teamsters* v. *Hanke,* 339 U.S. 470, 475, and his personal knowledge of the physical characteristics of the area. He had undoubtedly passed by, or shopped in the shopping center. He knew, for example, which road was the most heavily traveled.[10] He could find, therefore, based upon personal observation, that "the placards or banners will be plainly legible to passing motorists on both highways" (R. 98). As such, his judgment is entitled to "weighty respect."

We proceed to the Supreme Court of Pennsylvania, which has the authority to announce public policy, and enforce it by "constitutionally enjoin(ing) peaceful picketing aimed

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[10] At the trial, union counsel commented: "I am sure the Court knows (which is the most heavily traveled road)" (R. 50).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, *et al.*,
Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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INDEX

PAGE

Motion for Leave to File Brief Amicus Curiae 1

Interest of Amicus 3

Statement of Facts 3

ARGUMENT

I. Prohibition of peaceful picketing in a public or quasi-public place abridges the First Amendment 5

II. The shopping center in the case at bar is public for purposes of the application of the First and Fourteenth Amendments 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases:

Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 542, 122 N. W. 2d 785 (1963) 12

Edwards v. South Carolina, 372 U. S. 229 (1963) 5

Farmer v. Moses, 232 F. Supp. 154 (S. D. N. Y. 1964) .. 12

Freeman v. Retail Clerks Union, 58 Wash. 2d 426, 363 P. 2d 803 (1961) 13

Hague v. C. I. O., 307 U. S. 496 (1939) 6

Kovacs v. Cooper, 336 U. S. 77 (1949) 10

Marsh v. Alabama, 326 U. S. 501 (1946) 6, 7, 11

Maryland v. Williams, 55 L. R. R. M. 2357 (Md. Crim. Ct. 1959) 13

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 275 (1941) 9

Mills v. Alabama, 384 U. S. 214 (1966) 10

Moreland Corp. v. Retail Store Employees Union Local 444, 16 Wis. 2d 499, 114 N. W. 2d 876, 879 (19) 13

PAGE

National Lab. Rel. Bd. v. Babcock and Wilcox Co., 351 U. S. 105 (1956) 7
National Lab. Rel. Bd. v. Fruit and Vegetable Packers, 377 U. S. 58 (1964) 10-11
National Lab. Rel. Bd. v. United Steelworkers, 357 U. S. 357 (1958) 7
People v. Collins, 16 N. Y. 2d 554 (1965) 11
People v. Dews, New York Law Journal, June 16, 1967, p. 16 (App. Term 1st Dept.) (not off. rep.) 12
Saia v. New York, 334 U. S. 558 (1948) 10
Schneider v. State of New Jersey, 308 U. S. 147 (1939) 6, 10
Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 40 Cal. Rptr. 233, 394 P. 2d 921, cert. den. 380 U. S. 906 (196) 13
Thornhill v. Alabama, 310 U. S. 88 (1940) 2
United States v. Federal Communications Commission, No. 21147 8
United States v. Storer Broadcasting Co., 351 U. S. 192 (1956) 8
Williams v. Wallace, 240 F. Supp. 100 (M. D. Ala. 1965) 10
Wolin v. Port of New York Authority, 268 F. Supp. 855 (S. D. N. Y. 1967) 11

United States Constitution:

First Amendment 1, 2, 5, 6, 7, 9, 10, 11, 12
Fourteenth Amendment 6, 11

Other Authorities:

Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1655-1656 (1967) 9
Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 883 (1963) 7, 9
Federal Communications Commission, Rule 3.636 8

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LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union is a private, non-profit, non-partisan organization engaged solely in the protection of the Bill of Rights. It files this motion because the respondent has denied the ACLU's request that it consent to the filing of a brief amicus curiae. Respondent's letter has been filed with the Clerk of the Court.

We move for leave to file this brief because we believe that this case presents important questions which relate directly to the extent to which the right to picket is protected by the First Amendment. The right to picket is perhaps the most traditional form of expression, and the one most easily available to groups with limited financial

resources. It has long been recognized by this Court as a form of expression protected by the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

The extent of the right to picket is put to a new test in the case at bar. The case is an example of one question raised by the force of economic concentration, namely, whether a business organization can insulate itself from what it considers a disagreeable form of expression by asserting that its property rights are paramount to its opponents' speech rights. We believe they cannot and wish to file the attached brief in order to set forth our reasons.

Respectfully submitted,

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Attorney for Movant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

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—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus is set forth in the motion for leave to file, *supra*.

Statement of Facts

Petitioner, Amalgamated Food Employees Union Local 590 (hereinafter Union), seeks to overturn an order of the Supreme Court of Pennsylvania, three Justices dissenting, affirming a *nis prius* decree enjoining all picketing at and trespassing on the private property of respondent Logan

Valley Plaza, Inc. The injunction was originally issued *ex parte* by the Court of Common Pleas of Blair County on December 27, 1965. The Union moved to dissolve the injunction. After an evidentiary hearing the Court of Common Pleas denied the Union's motion and entered an order on February 14, 1966 "making permanent the injunction as previously decreed." The facts upon which the injunction was issued are briefly as follows:

Logan Valley Mall is a newly developed shopping center, situated in Logan Township near the city of Altoona, Pennsylvania, at the intersection of two public highways. It is approximately 1.1 miles around its perimeter, and contains a number of stores and other enterprises. At the time of the events in this case it was occupied by Sears Roebuck and Company, which operated a department store and a service station, and by respondent Weis Markets, Inc. The Weis property consists of a modern building with an open but covered porch running along the front and a pick-up zone directly along the porch. There are extensive parking lots to the east and south of the store, and there are also pedestrian ways. The nearest entrance from the highway is approximately 350 feet from the Weis property and the main shopping center entrance is 450-500 feet away.

Weis opened for business on December 8, 1965, employing an entirely non-union staff. Beginning on December 17, 1965, groups of between five and seven men and women walked back and forth in front of Weis, primarily in the pick-up zone, carrying placards which advised the public that Weis was non-union and identifying themselves as members of the Amalgamated Food Employees Union Local 590, the petitioner herein. The picketing was peaceful and unaccompanied by either threats of disorder or

disorder. Weis' assistant general manager told the pickets that they were trespassing, and ordered them to picket on the highway. After the injunction issued, petitioner began to picket on the highway's edge at four entrances. When the highway picketing began, the picketers began to give out handbills urging the public not to patronize non-union markets.

ARGUMENT

I.

Prohibition of peaceful picketing in a public or quasi-public place abridges the First Amendment.

This case concerns the right of individual citizens to engage in peaceful picketing designed to inform their fellow citizens of conditions involving a labor dispute, and to influence their conduct through the communication of this information.

The right to speak freely, to inform, and to dissent, is a basic right. Picketing is but one of the ways in which the right is exercised. Thus *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963) characterized an orderly demonstration involving more than 150 picketers protesting segregation on the South Carolina State House grounds as "an exercise of these basic constitutional rights [of speech, assembly, and petition for redress of grievances] in their most pristine and classic form."

Had the conduct enjoined in the present case occurred on publicly owned streets and sidewalks, it would have unarguably fallen within the protection of the First and

Fourteenth Amendments. Traditionally the public streets, parks, and meeting places have been recognized as places in which the exercise of First Amendment rights is proper and fitting, not only because they are held in trust for all citizens, but also because they are usually places where large numbers of fellow citizens can be reached. These sites are the "natural and proper places for the dissemination of information and opinion." *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939); *Hague* v. *C. I. O.*, 307 U. S. 496, 515, 516 (1939). Similarly, when privately owned property is in fact fulfilling a governmental function, the right to free expression on that property must be recognized. As this Court stated in *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

The *Marsh* holding is clearly applicable to the instant case. Respondents are in fact the "government" of this commercial land area. They have chosen to open their property to the general public for the purposes of trade. Petitioners sought only to impart information concerning that trade to respondents' invitees.[1] Under the circumstances, respondents' admitted right to enjoy the use of their property must yield to the requirements of the First Amendment.

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[1] The public nature of shopping centers is further developed in Point II, *infra*.

Since *Marsh*, the "preferred position" of free speech and effective expression has been more clearly delineated. Professor Emerson emphasized the fundamental importance of "the right of all members of society to form their own beliefs and communicate them freely to others" as "an essential principle of a democratically organized society." It plainly follows, as Emerson observes, that "The principles [of a system of free expression] must be continually reshaped and expanded to meet new conditions and new threats to its existence." Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877, 883 (1963).

In earlier years when a factory had one gate, it was reasonable to require those with grievances against the management to picket outside that gate or on the public way. Today, however, such restrictions would be artificial because only a small proportion of workers would be reached.[2] The same problem is present in this case. More and more of the retail trade of the country is located in "shopping center cities", which function both as the "governments" of these commercial areas, and as quasi-private

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[2] This Court has recognized the difficulties of communication in the analogous situation of the enforcement of a so-called "non-solicitation rule" against union organization on an employer's property. As this Court wrote in *National Lab. Rel. Bd.* v. *Babcock and Wilcox Co.*, 351 U. S. 105, 112 (1956):

> "When the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

In *National Lab. Rel. Bd.* v. *United Steelworkers*, 357 U. S. 357 (1958), this Court also noted that a "showing that the non-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees" was "a vital consideration in determining the validity of the non-solicitation rule." 357 U. S. at 363.

no-man's land between the public way and the grocery store.[3] To restrict the picketers to the publicly owned pavement favors property rights over the picketer's free speech rights. It is cold comfort to the union man fighting for the right to bargain collectively, to the Negro fighting for a job, to the housewife fighting an inexplicable rise in the price of eggs, to know that they can effectively picket the neighborhood candy store, but can only wave from the horizon at the vast accumulation of capital nestled inside a shopping center. Shopping centers are where the action is, and picketing the security guards at the edge of the parking lot is an exercise in futility.

In general, both the means of communication and available audiences have become increasingly concentrated. The independent newspaper is becoming extinct; in most cities, all daily papers are under a single ownership. In broadcasting, the dangers of concentration of ownership were early recognized by the Federal Communications Commission, whose Rule 3.636, commented on in *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), included a blanket prohibition against the ownership of or "direct or indirect" interest in more than five television stations by one person or company. Television stations, far from expressing divergent viewpoints, all too frequently present no viewpoint at all. These centripetal forces are illustrated by the pending acquisition by the International Telephone and Telegraph Company of the American Broadcasting Company.[4] In sum, rather than a system of open com-

[3] See statistics on the growth of shopping centers cited at pp. 31-32 of petition for certiorari.

[4] The validity of the merger is pending before the U. S. Court of Appeals for the District of Columbia in *United States* v. *Federal Communications Commission*, No. 21147.

munication in which diversity of opinion is the rule, the system approaches a closed market place in which only a "single point of view with minor variations, can find an outlet." Emerson, *op. cit. supra* at 953.

> "Today ideas reach millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1655-1656 (1967).

Without enormous financial resources, a person or an association of persons is confined to picketing, handbilling, and similar personal demonstrations in the attempt to communicate with the public, and the effort to secure public notice through the media. As this Court has observed, "Peaceful picketing is the workingman's means of communication." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 275, 293 (1941). If their efforts are not to be entirely futile, then the First Amendment must be construed in a way that will both permit and encourage the most expansive use of the limited forms of communication available to petitioner and others in similar circumstances.

Respondents contend that because the state court injunction did not prohibit picketing altogether, but merely moved

it some 350 feet away to the highway, petitioner's First Amendment rights were not infringed. Respondents' Brief in Opposition, p. 6. Such an argument ignores both the realities of the situation and the requirements of the First Amendment. First Amendment rights can and should be exercised in the place where they will be most effective. As this Court has stated:

> ". . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

The individual or individuals exercising First Amendment rights may also choose the most effective time, *Mills* v. *Alabama*, 384 U. S. 214 (1966), and manner in which they can be most effective, *Saia* v. *New York*, 334 U. S. 558 (1948); *Kovacs* v. *Cooper*, 336 U. S. 77, 87 (1949); see *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mandatory injunction authorizing a 45 mile protest march on a public highway by civil rights demonstrators from Selma to Montgomery, Alabama).

As Mr. Justice Black has stated:

> I cannot accept . . . [the] view that the abridgement of speech and the press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop. *National Lab. Rel. Bd.* v. *Fruit and*

Vegetable Packers, 377 U. S. 58, 79-80 (1964) (concurring opinion).

This rationale is equally applicable here. It is true that all motorists must enter the shopping center through one of five entrances, and that all motorists would, therefore, have to pass picketers if they were stationed at every entrance. Such a view, however, ignores the obvious fact that motorists traveling at a substantial speed and exiting from a highway will, hopefully, be watching the road, the exit itself, and the painted lanes which serve as roads across the parking lot. Under such circumstances, there is hardly the time for communication of any message, let alone contemplation of it. Under respondents' argument, the picketers might as well be required to remove themselves to the town of Altoona itself.

II.

The shopping center in the case at bar is public for purposes of the application of the First and Fourteenth Amendments.

There is no question that the shopping center involved in the instant case is dedicated to the public use and therefore subject to the application of the First and Fourteenth Amendments. *Marsh* v. *Alabama, supra.* In determining whether any particular location is public in this sense, the courts look to constitutional principles rather than the law of property. See *Wolin* v. *Port of New York Authority*, 268 F. Supp. 855 (S. D. N. Y. 1967) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City); *People* v. *Collins*, 16 N. Y. 2d 554 (1965), affirming 44 M: 2d 430, 254 N. Y. S. 2d 182 (App. T. 2d Dept.

1964); *Farmer* v. *Moses*, 232 F. Supp. 154 (S. D. N. Y. 1964) (exercise of First Amendment rights inside the New York World's Fair Grounds); *People* v. *Dews*, New York Law Journal, June 16, 1967, p. 16 (App. Term, 1st Dept.) (not off. rep.) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City).

A shopping center, by definition and purpose, is a place open to all members of the public to view and to buy merchandise and to obtain services of various kinds. The stores within the shopping center invite all citizens to come, to look, and to buy. The concourses and sidewalks within the shopping center function as thoroughfares for pedestrians just as public sidewalks function for shoppers in stores fronting on public streets. The shopping center parking lots provide a place not only where vehicles may be left while their owners walk through the center, but also provide what are in effect access roads from the highway to the shops themselves. In actual fact, the modern shopping center differs from the traditional town shopping area only in the happenstance that title to the land is privately held, a fact which is probably unknown and of little or no concern to the many thousands of persons who visit it.

The essentially public nature of the modern shopping center has been recognized by many courts in a number of contexts. In a suit for an injunction by a union, the Michigan Supreme Court held that management's interference with the union's distribution of handbills on a shopping center sidewalk was a violation of the First and Fourteenth Amendments. *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 542, 122 N. W. 2d 785 (1963). The Supreme Court of California similarly upheld

peaceful picketing inside a shopping center, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rptr. 233, 394 P. 2d 921, *cert. den.* 380 U. S. 906 (196). See also *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803 (1961); *Moreland Corp.* v. *Retail Store Employees Union Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876, 879 (19); *Maryland* v. *Williams*, 55 L. R. R. M. 2357 (Md. Crim. Ct. 1959).

CONCLUSION

For the reasons set forth above, the decision of the Court below should be reversed.

Respectfully submitted,

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SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
JAN 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, *et al.*,

Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' OBJECTIONS TO MOTIONS OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

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January 2, 1968

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Respondents respectfully oppose the motions by the American Federation of Labor and Congress of Industrial Organizations and the American Civil Liberties Union for leave to file briefs *amici curiae* for the following reasons:

1. The AFL-CIO is a federation of one hundred and twenty-nine (129) affiliated labor organizations, one of which is the Petitioner. The Retail Clerks International Association which is also a member of the AFL-CIO, has been granted leave to file a brief as *amicus curiae* in sup-

port of Petitioner. Consequently, the AFL-CIO will in fact be adequately represented by two of its members. If this motion were granted, this Court then will be receiving briefs from three affiliates of the same organization, the AFL-CIO.

2. Since Petitioner, as well as the National Labor Relations Board, has filed a brief and the Retail Clerks International Association has been granted leave to file brief *amicus curiae*, the American Civil Liberties Union has failed to set forth reasons for believing that the issues before the Court will not adequately be presented by the parties as required by Rule 42(3) of the Court's Rules.

3. For these reasons Respondents are withholding their consent to the AFL-CIO and the American Civil Liberties Union filing briefs *amici curiae* and oppose the motion by each of them for permission to do so.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., AMICUS CURIAE.

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BRIEF OF INTERNATIONAL COUNCIL OF SHOPPING CENTERS, INC., AMICUS CURIAE.

INTEREST OF AMICUS.

The International Council of Shopping Centers, Inc. is a not-for-profit corporation. Its membership of 2400 consists of entities and individuals involved in construction, acquisition, leasing and management of shopping centers. There are approximately 10,500 to 11,000 shopping centers in operation in North America. They account for approxi-

mately one-third of all retail sales, exclusive of the sale of automobiles and building materials. It is the only trade association representing the shopping center industry in the United States.

The Council's interest is obvious from the nature of the far-reaching contentions advanced to the Court:

1. By petitioners, that union pickets' rights of free speech should be extended so as to permit picketing on private property, specifically the parking lots and loading zones of the shopping center involved here, no showing having been made that respondents ever permitted any other non-shopping center use of the property;

2. By the *amicus* brief of the American Civil Liberties Union, which suggests that similar rights should be extended not only to union pickets, but also to other demonstrators who believe shopping center property provides a more "effective" site for their activities than public property (p. 8).

Either contention, if accepted, would result in expropriation of private property, the access to which has heretofore been limited to those in either actual or potential business relations with the owner or tenants of the shopping center. The matter is of considerable importance to shopping center owners and tenants as their income is dependent upon the untrammeled availability, and ease of customer access to, parking space.

The written consents of counsel for petitioners and respondents have been filed with the Clerk of this Court.

ARGUMENT.

While petitioners' arguments in favor of permitting pickets to invade private property are couched in the evocative and ringing rhetoric of civil liberties, the sole asserted justification for this novel proposition is that it would make such picketing more "effective" (p. 24). We will show:

(1) This Court has never accepted "effectiveness" as a justification for the right to demand access even to public property where the asserted right of free speech would conflict with the limited use to which the property has been put.

(2) The only decisions of this Court which have recognized a right of access to private property as a necessary adjunct of free speech have involved company towns, logging camps or other areas from which the inhabitants emerge only rarely and irregularly, and those decisions have sought to protect such inhabitants from censorship.

(3) A decision holding that the right of free speech embraces a right of access to the speaker's favored forum on others' property would wreak havoc with shopping centers and with all attempts by owners, public or private, legitimately to select the use to which their property is to be put. As to shopping centers, it would constitute an unlawful, uncompensated, expropriation of private property for the private use of others.

1. This Court recently rejected the proposition that the right of free speech carries with it the right to picket or demonstrate everywhere on publicly owned property. In *Adderley* v. *Florida*, 385 U. S. 39 (1966), petitioners were students who had been convicted of trespass for demonstrating on the premises of a county jail protesting

against some of their schoolmates' arrests in civil rights demonstrations. This Court scotched the notion that a speaker has a constitutional right to demand access to any site felt by him to be "particularly appropriate":

> "*The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.* For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also *particularly appropriate.* . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases Petitioners rely on, *Cox* v. *Louisiana, supra,* at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." (pp. 47-48, emphasis added.)

Four members of the Court dissented on the ground that the demonstration was a petition for the redress of grievances and that the jailhouse was a "seat of government" and therefore appropriate for such a protest (p. 49). However, the dissent recognized that "to say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government not to private proprietors" (p. 52).

Even as to publicly owned property the dissent recognized no right of unlimited access:

> "A noisy meeting may be out of keeping with the serenity of the state house or the quiet of the court-

> house. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally." (p. 54.)

The Court has expressed similar views as to the rights of groups holding public meetings on private property to exclude persons desiring to speak from such forums. In *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), which involved the constitutionality of a municipal ordinance forbidding the use or operation of sound trucks on public streets, the Court observed:

> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism."
>
> • • • • •
>
> "While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign *'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. Martin* v. *Struthers*, 319 U. S. 141, 143, 148." (pp. 86-87; emphasis added.)

2. The only cases in which this Court has held that the right of free speech carried with it a right of access to private property have involved company towns, logging camps or other areas where the right of a community of citizens has been involved. Thus, in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the Court in a divided opinion reversed a conviction for trespass stemming from Marsh's distribution of religious literature on the sidewalks of a company-owned town. The essential reasoning was:

> "[T]he circumstance that the property rights to the premises where the deprivation of liberty, here in-

volved, took place, were held by others than the public, is not sufficient to justify the State's permitting a *corporation to govern a community of citizens so as to restrict their fundamental liberties* and the enforcement of such restraint by the application of a state statute." (p. 509; emphasis added.)

The Court reasoned:

> "Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. *To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.* There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (pp. 508-509; emphasis added.)

Justice Frankfurter filed a concurring opinion stating "[t]hese community aspects are decisive in adjusting the relations now before us . . ." (pp. 510-511).

Marsh v. *Alabama* was, of course, the precursor of other decisions recognizing the right of access to company-owned towns or other isolated communities of citizens: *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226 (1946) (company town); *NLRB* v. *Lake Superior Corp.*, 167 F. 2d 147 (C. A. 6, 1948) (company-owned logging camp); *NLRB* v. *City Service Oil Co.*, 122 F. 2d 149 (C. A. 2, 1941) (ship's crew). That the community aspects of these cases were decisive was reemphasized again in *Evans* v. *Newton*, 382 U. S. 286 (1966) both by the majority and dissent.

The instant case does not involve a company town or a community of any variety. No one lives in the shopping center. There are no citizens whose right to know need be

protected from censorship; no inhabitants whose rights to speak may be inhibited.

It is therefore apparent that the petitioners can find no comfort in the prior decisions of this Court, but rather are asking it to manufacture new constitutional doctrine out of thin air. Certainly a plain reading of the First and Fourteenth Amendments can support no such invasion of the landowner's right to control his property and use it as he sees fit.

3. A few practical observations should be made.

Shopping centers are a response to the needs and demands of customers, the principal two of which are: (1) their need and desire for adequate parking space immediately adjacent to where they intend to make their purchases; and (2) the desire of the consumer for one-stop shopping. Neither in this case nor in general is there the slightest bit of evidence that shopping centers are designed to insulate tenants from labor unions.

The gross sales of a shopping center are so dependent upon available parking space, and land for parking is so expensive, that this *amicus* has subsidized studies by the Urban Land Institute which have concluded, that there is an optimum ratio of parking spaces to the gross leasable area of the shopping center. (Aronov, Aaron in Chain Store Age Sp. Ed. E. 41, May, 1967.) The shopping center also bears the heavy costs of taxation and maintenance of the parking lot and other common areas. It follows therefore that, as a matter of economic self-defense, shopping center owners and tenants typically prohibit non-business use of their parking facilities, one of their most valuable assets, and mutually covenant that the parking lots and other common areas will be used solely for the purposes for which designed.

The steps which shopping center owners take to limit

the use of their property to customers vary, but among the more common are: posting signs informing the public that the shopping center is private property "for use by customers only"; placing chains across entrances during non-business hours; towing away cars parked there by non-customers; restricting employee parking to designated areas; prohibiting the placing of advertising material on cars parked in the center; and otherwise policing the area.

At the time of the issuance of the injunction in this case the shopping center was only partially open, only two tenants having their business in operation (R. 88). (Petitioners assert that there are now fifteen additional businesses there (p. 3, fnt. 1).) Nevertheless, even though the shopping center was new, what little evidence there is in the record will not support petitioners' extravagant claim that, "*unlike other members of the public,* the picket with a labor message has not been invited to enter."

There is no evidence in the record that the Logan Valley Plaza was opened to the public except for persons who were customers, or potential customers, or had other business relationships with either the owner or tenants. There is no evidence that it had ever permitted its parking lot, or that Weis had permitted its parcel pick-up zone, to be used for other purposes. The only evidence is to the contrary—the Weis manager asked the manager of a competitive store who had blocked the pick-up zone with his car to move it and he did so (R. 30-31).

The effects of the picketing demonstrate precisely why the shopping center owner and tenant necessarily attempt to exclude non-customers of whatever persuasion from their property. The pickets marched two, three and four abreast (R. 32, 47) in the vicinity of the parcel pick-up zone (R. 29) "right where the cars will drive in for the groceries" (R. 47). The picketing "hindered the cars from driving in" (R. 47), "causing congestion" (R. 30) in the

pick-up zone, resulted in a "milling around" (R. 30) of customers among the moving cars, required "navigating by customers in and out" (R. 44) and endangered the pickets (R. 44) and undoubtedly customers as well.

It is obvious that petitioners' conduct was wholly in conflict with the legitimate business purposes for which the parcel pick-up zone was intended.

4. Viewed more broadly, it is obvious that petitioners' essential argument is an attack on the fundamental right of an owner to determine and control the use to which his property is to be put and to exclude other persons from it where they endeavor to use it for purposes that conflict with the intended use. These rights to determine use and to prevent other use are essential attributes of the value of property to the owner. Moreover, the argument that the right of free speech carries with it the right of access to the speakers' most favored forum, and that those rights are superior to the rights of ownership, is a limitless doctrine leading to the grossest of absurdities. At the risk of belaboring the obvious, we suggest that the right of free speech does not justify intrusion into the quiet of the reading room of a public library, nor does it afford the Lutheran a right to "demand equal time" in a Catholic church. *A fortiori*, in the private sector no rule of law or reason requires a shopping center owner to permit his parking lots and sidewalks to become a cockpit for contending factions, assorted demonstrators, or business competitors. Any such result would clearly run afoul of the Fifth Amendment and amount to nothing more than the expropriation of private property for what petitioners conceive to be public purposes. If the need for unlimited access to parking lots of shopping centers be so vital to the public as petitioners contend, we suggest that the constitutional method of satisfying that (we say non-existent) need would be condemnation of the parking lots by the

appropriate state authority with fair compensation to the owner, removal of the property from the tax rolls, and assumption by the public of the burdens of maintaining it and providing police protection. If the public interest in the matter be as substantial as petitioners contend, the public is not without tools to protect it in a constitutional fashion.

CONCLUSION.

The decision of the Court below should be sustained.

Respectfully submitted,

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January 26, 1968.

SUPREME COURT, U. S.

FILED

FEB 2 1968

JOHN F. DAVIS, CLERK

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Supreme Court of the United States

OCTOBER TERM, 1967

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Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

INTEREST OF THE AMERICAN RETAIL ASSOCIATION 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. TRESPASS IS A MATTER OF SUBSTANTIAL AND LEGITIMATE STATE CONCERN 7

II. THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE ANY RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION 10

III. THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT 19

CONCLUSION 25

AUTHORITIES CITED

CASES:

Adderley v. Florida, 385 U.S. 39 ..... 10, 12, 22

Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W. 2d 785 (1963) 9

Bakery Drivers Local 802 v. Wohl, 315 U.S. 79 .. 11

Blue Ridge Shopping Center v. Schleininger, 65 LRRM 2911 (S. Ct. Mo., July 10, 1967) 10

Breard v. Alexandria, 341 U.S. 622 13

Building Service Union v. Gazzam, 339 U.S. 532 11

Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 15

PAGE

Clark v. Rich's Inc., 114 Ga. App. 242, 150 S.E. 2d 716 (1966) 8

Cox v. Louisiana, 379 U.S. 559 11

Donovan v. Pennsylvania Company, 199 U.S. 279 .. 7

Excelsior Underwear, Inc., 156 NLRB 1236 17

Freeman v. Retail Clerks Union, 45 LRRM 2334 (Super. Ct. 1959), rev'd, 58 Wash. 2d 426, 363 P. 2d 803 (1961) 2

General Electric Co., 156 NLRB 1247 17

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 11

Hall v. Virginia, 188 Va. 729, 49 S.E. 2d 369 (1948); app. dism., 335 U.S. 875, reh. den. 335 U.S. 912 13

Hanna Mining Co. v. District 2, MEBA, 382 U.S. 181 24

Honolulu Typographical Union No. 37 (Hawaii Press Newspapers), 167 NLRB No. 150 18

Hotel and Restaurant Employees Local 802 v. Asimos, 216 Ark. 694, 227 S.W. 2d 154 (1950) .. 9

Hughes v. Superior Court, 339 U.S. 460 .....5, 11, 14

International Association of Machinists v. Gonzales, 356 U.S. 617 23

Linn v. United Plant Guard Workers, 383 U.S. 53 .....20, 22, 23, 24

Marsh v. Alabama, 326 U.S. 501 13

Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 16

Millmen Union Local 324 v. MKT Railroad Co., 253 S.W. 2d 450 (Tex. Civ. App., 1952) 9

PAGE

Moreland Corp. v. Retail Store Employees Union, Local 444, 16 Wis. 2d 499, 114 N.W. 2d 876 (1962) 9, 10

NLRB v. Babcock & Wilcox, 351 U.S. 105 ..... 12, 16

NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 16

NLRB v. District 65, Retail, Wholesale Department Store Union, 375 F. 2d 745 (C.A. 2, 1967) 16

Nocar v. Greenberg, 210 Md. 506, 124 A. 2d 757 (1956) 8

People ex rel. Koester v. Rozensweig, 171 Misc. 702, 13 N.Y.S. 2d 795 (1939) 9

People v. Goduto, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961); cert. den., 368 U.S. 927 ..... 4, 8, 13, 23

People v. Poe, 236 Cal. App. 2d Supp. 928, 47 Cal. Rptr. 670 (1965) 9

People v. Weinberg, 6 Mich. App. 345, 149 N.W. 2d 248 (1967) 10

Plumbers Union v. Borden, 373 U.S. 690 21

Plumbers Union v. Graham, 345 U.S. 192 15

Reed v. State Farm Mutual Automobile Insurance Co., 188 So. 2d 756 (Ct. App. La. 1966) 8

Sailor's Union of the Pacific (Moore Drydock Co.), 92 NLRB 547 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 20

Schwartz-Torrance Investment Corp. v. Bakery Workers Local No. 31, 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P. 2d 921 (1964); cert. den. 380 U.S. 906 ..... 9, 10

PAGE

Stafford v. Hood, 213 Tenn. 684, 378 S.W. 2d 766 (1964) 9

State v. Martin, 199 La. 39, 5 So. 2d 377 13

State v. Quinnell, ... Minn. ....., 151 N.W. 2d 598 (1967) 5, 7, 8, 10

Stoddard-Quirk Manufacturing Co., 138 NLRB 615 16

Teamsters Union v. Hanke, 339 U.S. 470 .....10, 12, 14

Thomas W. Finucane Corp. v. State, 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. of Claims, 1966) .. 3

United Auto, A. & A. I. W. v. Wisconsin Emp. Rel. Bd., 351 U.S. 66 23

Vaca v. Sipes, 386 U.S. 171 20

Whittlesey v. United States, 221 A. 2d 86 (Ct. App., D.C., 1966) 10

STATUTES:

National Labor Relations Act, as amended, 61 Stat. 316, 29 U.S.C. § 141 et seq. 19

MISCELLANEOUS:

Applebaum, Consumption and the Geography of Retail Distribution in the United States, Michigan State University Business Topics, Summer 1967 ..... 3, 4

Gould, The Question of Union Activity on Company Property, 18 Vand. L. Rev. 73 (1964) .. 16

Lewis, The Meaning of State Action, 60 Col. L. Rev. 1083 (1960) 13

Restatement (Second), Torts, Section 158 7

Retail Clerks Advocate 3, 18

Schlossberg, Organizing And The Law, A Handbook For Union Organizers, 1967 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, et al.,

Petitioners,

v.

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

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* Pursuant to Rule 42, §2 of the Rules of the Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief *Amicus Curiae.*

The interest of the Federation, in urging affirmance of the decision of the court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry.

This case has been phrased by Petitioners, and by the *amicus* briefs in support of Petitioners' position, as a "shopping center" case.[1] This characterization, however, is misleading and an oversimplification; the term "shopping center" simply will not function as a "phrase of art."[2] Rather, although the term has become broadly descriptive of certain business operations—and, indeed, will be used as a term of reference herein—"shopping centers" are not so precisely definable and cannot be so clearly differentiated from other forms of retailing that any rules here enunciated can be regarded as applicable only to a specific and delimited classification of enterprises.[3]

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[1] See Petitioners' Brief, p. 2; Brief of *amicus* Retail Clerks International Association (hereafter referred to as RCIA, pp. 1-4; Brief of *amicus* National Labor Relations Board (hereafter referred to as NLRB), p. 1 and Brief of *amicus* American Federation of Labor and Congress of Industrial Organizations (hereafter referred to as AFL-CIO), p. vi.

[2] Brief of RCIA, fn. 1. The footnote proceeds to give, for example, "*one* definition" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY that it is a group of retail stores "*usually* with general parking space and *usually* planned to serve a community or neighborhood" and to further point out that there "are *three of four generally accepted categories of shopping centers, variously defined.*" (All italics supplied.)

[3] Cf., e.g., *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2337 (Super. Ct., 1959), rev'd. on preemption grounds, 58 Wash. 2d 426, 363 P. 2d 803 (1961):

> "The term 'shopping center' can be applied to any number and variety of merchandising and service

Shopping centers can be of practically any size, ranging from large regional shopping centers to local neighborhood centers with but a few small independent stores.[4] In fact, the relatively smaller shopping centers predominate the field.[5] Shopping centers can also be of virtually any shape. Thus, the only common characteristics of all shopping centers are that they (1) offer a variety of-

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[3] (Continued)

operations. What is a shopping center? Does a shopping center become such by reason of having seven, seventeen or seventy places of business? Does it become a shopping center because it is an outdoor operation? One of the reasons that the contention of the defendants cannot be a rule of law is because there is no legally acceptable definition of the phrase 'shopping center.'"

[4] Cf., e.g. the "shopping center" described in *Thomas W. Finucane Corp.* v. *State,* 52 Misc. 2d 462, 276 N.Y.S. 2d 225 (Ct. Cl., 1966) an eminent domain case, which consisted of a one-story masonry block building containing 17,463 square feet. There were three tenants in the building—a drug store, a chain grocery store and a dry cleaning establishment.

[5] As of January, 1965, there were a total of 8,076 shopping centers in the United States. Approximately 60% or 4,925 of the centers had a gross leaseable area of less than 100,000 square feet—which is an area smaller than 500 by 200 feet—with an average leaseable area of 56,000 square feet. Another 25% or 2,066 centers had a gross leaseable area of 200,000 square feet or less (the equivalent of 500 feet by 400 feet). These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,000 centers are "medium sized" (200,000 to 400,000 square feet) and but 400 are large or regional shopping centers. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States,* Michigan State University Business Topics, Summer 1967, pp. 28-29. Similar statistics, prepared by W. Donald Calomiris, president of the Institute of Real Estate Management, are quoted in the magazine of RCIA, *The Retail Clerks Advocate,* August, 1967, p. 6.

goods and services to the public, (2) are located on single tracts of land with definite established boundaries and (3) provide parking area for the customers—significantly, characteristics also present in and not substantially different from those of other types of retail enterprises or establishments which are not generally regarded as "shopping centers."

For example, there are many single unit department stores or discount houses which offer not only their own merchandise but also the merchandise of others through leased departments or concessions and which have parking areas open to the public. As one commentator observed, such an enterprise "is essentially a shopping center by itself, under one roof."[6] In addition, there are large single retail stores, frequently a branch of a national chain, located on their own tract of land with a substantial public parking area.[7] There are retail enterprises which, instead of being constructed on a horizontal plane, as in the cases of the sprawling one-story suburban shopping center or free standing store, are constructed on a vertical plane because of space limitations as those which exist in downtown locations.[8] Similarly situated

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[6] Applebaum, *id.* at 31.

[7] See, for example, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.*, 368 U.S. 927, involving a Sears, Roebuck and Co. retail store. Such stores are generally described as "free standing" stores. Since these stores (as well as discount stores) are usually large operations, the goods and services offered by them will frequently substantially exceed those offered in the smaller or even medium-size "shopping centers".

[8] See Brief of RCIA, p. 7, referring to shopping centers that "have not only spread out, but they are building up." These centers frequently have customer parking areas constructed on several levels attached to the store with entrance into the store directly from the various levels of the parking area.

also are those multiple stores, shops and offices, located within a single building with a common entranceway, stairwells and corridors, or the multiple manufacturing or retail establishments located within industrial parks and connected only by means of a series of private roads fronting on a public artery. All such enterprises, regardless of size, shape, or the terms used to describe them, are open to the community that makes the center or store "a market place whose very being inheres in its openness to the public."[9]

The interest of the Federation is predicated on the potentially substantial and far-reaching consequences that any decision herein may have for all methods of retail operation, rather than just "shopping centers" however they may be defined. The concern of the *amicus* is that the Court, in formulating the principles to resolve the instant controversy, should be aware of the ramifications thereof on all of these retail establishments as they may be affected by unlawful entry upon their property, whether by a labor union to picket for a variety of conceivable objectives[10] or by other organizations or individuals to propagandize other messages.[11]

SUMMARY OF ARGUMENT

The states have traditionally exercised a substantial and legitimate interest in regulating unauthorized entry upon the property of its citizens. This responsibility has been recognized not only as a basis for protecting the property rights involved and determining matters of

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[9] Brief of Petitioners, p. 12.

[10] See, e.g., Brief of RCIA, p. 9.

[11] E.g., the factual situation involved in *State* v. *Quinnell*, ... Minn. ....., 151 N.W.2d 598 (1967), or *Hughes* v. *Superior Court*, 339 U. S. 460.

at preventing effectuation of that policy." *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284, 293.

The Supreme Court of Pennsylvania stated that the issue before it was whether "in the factual matrix of the case at bar, the *conduct* of the pickets constituted an invasion of the private property of Weis and/or Logan," and whether "the parcel pick-up zone and the parking areas constitute private or quasi-public property." (Emphasis added.) It stated that the "resolution of that question involves the consideration of many factors" (R. 104-05). It proceeded to analyze the "social and economic factors," *International Bhd. of Teamsters* v. *Hanke*, 339 U.S. 470, 474, to be considered.

It pointed out that "the success of both Weis' store and the Logan shopping center depends upon the extent to which both are able to induce and persuade the public to visit and shop in the area" (R. 104). But, said the court, it "lacks any basis in law or common sense" to hold that by such solicitation of patronage "these property owners (also) solicited the use of their property by persons who were attempting to discourage the public from patronizing the store facilities . . ." (R. 106).

The court thus concluded that the property on which the picketing took place was private property and that "such use (picketing) constituted a trespass which very properly was restrained" (R. 106). In so declaring, it reaffirmed its public policy that it was "clear beyond question" that "the Commonwealth has not only the power but the duty to protect and preserve the property of its citizens from invasion by way of trespass . . ." (R. 104).

Similarly this Court stated:

> "The State, no less than a private owner of property, has power to preserve the property under its control

for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47.

But the union asserts that although "the property is private . . . the use is public." (Brief for Petitioners, p. 12.) Was it a public use "to which (the parcel pick-up zone) was lawfully dedicated?" *Adderley* v. *State of Florida, supra.* The Supreme Court of Pennsylvania responded that "neither the record nor common sense would justify such a finding" (R. 104).

Certainly, there was no common-law dedication.[11] In the present case, there was a clear intention not to dedicate, but to retain control and exercise exclusive ownership. The no-trespass rule posted by the owner of the property, Weis, evidences an intent not to open the area to the public's general use. Nor could any dedication have taken place in the few days the store was opened prior to the commencement of the picketing. Certainly, under these circumstances, the parcel pick-up area and the front porch owned by Weis could not be deemed to have been dedicated to public use.

The pickets in the instant matter were all employees of Weis' competitors.[12] *Indisputably, Weis did not invite its competitors' employees (the pickets) to confront Weis' customers at the threshold of Weis' property, so that they could there promote their employers' businesses, and destroy that of Weis.*

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[11] In 3 American Law of Property, §12.132 (1952), "Dedication" is defined as: "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use." See also, 4 Tiffany, Real Property, §1098, p. 329 (3rd ed., 1939).

[12] In distinguishing a prior holding, the Supreme Court of Pennsylvania took note of the fact that the pickets were non-employees. The Supreme Court, of course, did not "justify the prohibition of peaceful picketing" based on this fact, as the union incorrectly argued in its Brief at p. 37, and elsewhere.

The objective of these pickets was the antithesis of lawful business invitees. "To hold that (Weis) solicited the use of this property by persons who were attempting to discourage the public from patronizing the store facilities lacks any basis in law or common sense," stated the Supreme Court of Pennsylvania, in affirming the decree of the trial court (R. 106).

It is submitted that the courts below struck a reasonable balance after considering the social and economic factors in this case. Under these circumstances, their judgment should be accorded a weighty title of respect by this Court, and affirmed.

POINT IV

THIS COURT RECOGNIZES THAT DIVERGENT SOCIAL AND ECONOMIC VIEWS HELD BY STATES MAY RESULT IN THEIR STRIKING DIFFERENT BALANCES.

In affirming an Illinois judgment upholding an injunction against picketing, this Court stated:

> "That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296.

This Court has also noted that:

> "The policy of a state may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate." *Hughes* v. *Superior Court*, 339 U.S. 460, 468.

Whichever course the state takes, this Court will not assess the wisdom of its policy. *Carpenters Union* v. *Ritter's Cafe*, 315 U.S. 722, 725; *Giboney* v. *Empire Storage Ice Co.*, 336 U.S. 490; *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, 536-37.

Accordingly, that California has struck a different balance, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union*, 61 Cal. 2d 766, 394 P. 2d 921, *cert. denied*, 380 U.S. 906, only underscores the fact that states have different social and economic views, resulting in different public policy.

California's public policy relative to the respective rights of pickets and property owners was enacted into statute form. The California Supreme Court held that the statute "specifically subordinated the rights of the property owner" to that of a labor union, and excepted picketing by a labor union from its criminal trespass statute, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Union*, *supra* at 769. Thus, it relied on its statutory declaration of public policy, when it weighed the competing interests of a retailer in a shopping center, against that of a union engaged in picketing therein. It had no difficulty, therefore, in holding that the scales tipped in favor of the union.

That Pennsylvania balances the interests differently, is not unconstitutional, for the Constitution does not command "logical symmetry." *Hughes* v. *Superior Court*, 339 U.S. at 468.

POINT V

THE NARROWLY DRAWN INJUNCTION HEREIN IS VALID UNDER THE FEDERAL CONSTITUTION.

The injunction issued by the trial court did not enjoin all picketing. It merely regulated the place of the picketing, the number of pickets, and prohibited physical interference and violence (R. 102, 102 n.4). It expressly permitted continued picketing elsewhere, where the pickets "will be still in the vicinity and clearly within view of the Weis supermarket," and where the pickets' banners "will be plainly legible to passing motorists . . ." (R. 98).

This Court has sanctioned the use of narrowly drawn injunctions. In *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298, this Court stated:

> "The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely. . . . An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo."

In *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, this Court noted, in finding no unwarranted restraint of picketing, that:

> "The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated. . . ." 339 U.S. at 541.

In the instant matter there was no unwarranted restraint of picketing. The injunction granted was tailored to prevent a "specific violation of an important state law." The

decree was limited to the "wrong being perpetrated," namely, the tort of trespass. It did not "reach the union's conduct in its entirety." *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20. It expressly recognized that it did not have the right "totally to prohibit the picketing" (R. 96).

It is submitted, therefore, that this narrow limitation of picketing accommodated the interests of all parties. The union's opportunity to communicate with the public was preserved and enlarged, Weis' property rights were protected and the public's right to trade without interference was secured.

POINT VI

THE UNION'S FEDERAL PREEMPTION DEFENSE WAS NEITHER RAISED NOR ARGUED BEFORE THE SUPREME COURT OF PENNSYLVANIA. THEREFORE, THIS DEFENSE MAY NOT BE RAISED HERE.

A. *This Court Will Not Entertain Defenses That Were Not Raised Before A State Supreme Court.*

Under an "unbroken line of precedent," this Court has held that contentions or defenses not raised before a State Supreme Court may not be entertained here. *Beck* v. *Washington*, 369 U.S. 541, 553; *State Farm Mut. Auto Ins. Co.* v. *Duel*, 324 U.S. 154; *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334; *Wilson* v. *Cook*, 327 U.S. 474; *Blair* v. *Oesterlein Co.*, 275 U.S. 220. "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." *Whitney* v. *California*, 274 U.S. 357, 362. A failure to pursue properly the question of federal preemption on appeal in a state court proceeding, precludes this Court from review of that question. *Safeway Stores* v. *Oklahoma Grocers*, 360 U.S. 334, 342 n.7. Thus, this Court is limited in the scope of its review of the judgment of the Supreme Court of Pennsylvania to federal issues which were properly raised before that tribunal.

B. *The Defense Of Federal Preemption Was Never Presented To The Supreme Court Of Pennsylvania For Its Determination, Nor Did That Court Address Itself To The Question.*[13]

1. The Rules of the Supreme Court of Pennsylvania require that questions be properly presented.

In order to properly raise a question before the Supreme Court of Pennsylvania, the question must be included in the Statement of Questions Involved. *Rules Of The Supreme Court of Pennsylvania*, Rule 59. The Rule is mandatory:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. . . . *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or necessarily suggested by the statement of questions involved.*" (Emphasis added.) Pa. Sup. Ct. R. 59 (as amended to Jan. 1, 1967).

The Supreme Court of Pennsylvania has consistently held that it will refuse to consider questions not presented as the Rule dictates. The point or defense is considered abandoned or waived. *Dunmore* v. *McMillan*, 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger*, 390 Pa. 331, 135 A. 2d

[13] In its Brief before this Court, the union notes that: "The Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.)

395; *Kerr* v. *O'Donovan*, 389 Pa. 614, 134 A. 2d 213; *Blue Anchor Overall Co.* v. *Pennsylvania Lumbermens Mut. Ins. Co.*, 385 Pa. 394, 123 A. 2d 413; *Snyder Estate*, 346 Pa. 615, 31 A. 2d 132, *cert. denied*, 320 U.S. 750, rehearing denied, 320 U.S. 812; *Commonwealth* v. *Cauffiel*, 298 Pa. 319, 148 Atl. 311.

2. The defense of federal preemption was not included in the union's statement of questions involved.

The union, in its Brief filed with the Supreme Court of Pennsylvania, set forth the following as its Statement of Questions Involved.[14]

"STATEMENT OF QUESTION INVOLVED"

"Did the lower court err in granting a Preliminary Injunction without hearing and thereafter, denying and dismissing appellant's motion to dissolve or modify said injunction and further, continuing said Preliminary Injunction, where in a suit in equity by the owner of a shopping center and one of its tenants it is established that appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?

"Negatived by the Court below by the granting and continuance of a Preliminary Injunction which restrained appellant-union from picketing within the entire limits of the shopping center area." (Emphasis in original.)

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[14] The Union's "Brief for Appellants" was lodged with this Court on November 20, 1967.

It is crystal clear, and beyond peradventure, that the union did not include the question of federal preemption in its Statement.[15] Thus, since it is mandatory that "no point will be considered which is not thus set forth," (Rule 59), "the Pennsylvania Supreme Court did not address itself to the question of federal preemption." (Brief for Petitioners, p. 10.) Consequently, the defense of federal preemption was waived before that court. Accordingly, it may not now be raised before this Court.

This Court so held in *Beck* v. *Washington*, 369 U.S. 541. In that case, this Court was confronted with a similar state Rule of Court,[16] and a similar failure by a petitioner to comply. This Court flatly refused to entertain an argument based on a point not properly raised.

In an analogous case, *CIO* v. *McAdory*, 325 U.S. 472, one of the questions before this Court was whether a state statute was in conflict with the National Labor Relations Act. However, the question of federal preemption had not been considered by the Alabama Supreme Court. In interpreting an appellate rule very similar to Rule 59 of the Supreme Court of Pennsylvania, this Court found that the Alabama Supreme Court would not consider errors which had not been assigned or which had not been specifically and precisely raised in the assignments of error. This Court held in that case that because of the failure of the parties to comply with the Alabama Supreme Court Rules, this Court would not consider the preemption issue.

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[15] Contrast the specific presentation of the defense of federal preemption in the "QUESTIONS PRESENTED" to this Court in Brief for Petitioners, p. 2 with its complete omission in the court below.

[16] "Rule 43 of the Rules on Appeal, Revised Code of Washington, provides that '[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the "assignments of error" in appellant's brief.'" 369 U.S. at 552.

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. *Caperton* v. *Bowyer*, 14 Wall. 216, 236; *Hulbert* v. *Chicago*, 202 U.S. 275, 280, 281; *Dorrance* v. *Pennsylvania*, 287 U.S. 660; *Chandler* v. *Manifold*, 290 U.S. 665; see also *Flournoy* v. *Wiener*, 321 U.S. 253; *Charleston Assn.* v. *Alderson*, 324 U.S. 182, 185 and cases cited." 325 U.S. at 477.

In another case where this Court was confronted with a defense that had not been asserted below (the petitioner having failed to comply with the State Supreme Court Rules), this Court refused to listen to the plea and stated:

"The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court. . . ." *Wolfe* v. *North Carolina*, 364 U.S. 177, 196, rehearing denied, 364 U.S 856.

3. The defense of federal preemption was not argued before the Supreme Court of Pennsylvania.

Rule 55 of the Supreme Court of Pennsylvania requires that briefs filed with it contain a "Summary of Argument" and "Argument."

Rule 61½ of the Supreme Court of Pennsylvania requires that the "Summary of Argument" contain a concise summary of the party's arguments in the case.

In its "Summary of Argument," the union urged that: (1) a labor dispute existed within the meaning of the Pennsylvania Labor Anti-Injunction Act and thus could not be enjoined; (2) the picketing was peaceful; (3) there was no trespass, since the property, while technically private, was quasi-public in nature; (4) the right of control "is subordinated to the constitutional rights of the members of the public who use the property." (Brief for Appellants, p. 6.)

Rule 62 requires that each question before the court be argued under separate headings, which headings should indicate the particular point treated therein.

Under "Argument for Appellant" the union set forth its arguments concerning freedom of speech, the peaceful nature of its picketing, the quasi-public character of the property, and the inapplicability of the Pennsylvania Anti-Injunction Act. (Brief for Appellants, pp. 7-21.) It declared that "the problem of trespassing" was "the real issue here involved." (Brief for Appellants, p. 14.)

4. The defense of federal preemption was not argued before the trial court.

On January 19, 1966, the union filed its "Brief for and on behalf of Defendant in Support of its Motion to Dissolve or Modify the Preliminary Injunction," together with a Reply Brief.[17]

The arguments presented were similar to the arguments later presented to the Supreme Court of Pennsylvania, discussed above. The union did not argue federal preemption in either its Brief or Reply Brief. On the contrary, the

[17] Petitioners' "Brief in Support of its Motion to Dissolve or Modify the Preliminary Injunction," including the attached Reply Brief, was lodged with this Court on November 29, 1967.

Opinion of the trial court recited that the union conceded the court's jurisdiction.[18]

5. The Supreme Court of Pennsylvania has decided questions of federal preemption when properly raised.

The Supreme Court of Pennsylvania has decided many cases in which this defense has been raised. Whenever it is presented, it is resolved by the court. See, e.g., *City Line Open Hearth, Inc.* v. *Hotel Employees Union*, 413 Pa. 420. 427, 197 A. 2d 614, and cases cited; and *Lay* v. *Local 174, International Bhd. of Electrical Workers*, 427 Pa. 387, 235 A. 2d 402, and cases cited.

In *Lay*, the most recent case in which the defense of preemption was raised before the Supreme Court of Pennsylvania, the Court discussed the problem at great length. It set forth the elements a party must prove in order to establish that the state court is ousted of jurisdiction:

> "(I)t is necessary, in this class of cases, for the parties who claim that the N.L.R.B. has exclusive jurisdiction to prove, inter alia, (1) that the employer was engaged in interstate commerce . . . and (2) that the challenged activities were expressly or arguably within the jurisdiction of the N.L.R.B. . . ." 427 Pa. at 389, 235 A. 2d at 403.

The Supreme Court of Pennsylvania further noted:

> " 'Furthermore, the jurisdiction of the N.L.R.B. must be readily ascertainable from the averments of fact con-

[18] "We need involve ourselves in no detailed discussion of our jurisdiction and power to regulate the location of picketing of the type here engaged in so as to prevent trespassing on private property; defendant union concedes such authority, which is supported by the case law of this Commonwealth" (R. 90).

tained in the Complaint itself, or must be affirmatively proved by the party alleging such jurisdiction.'" 427 Pa. at 389, 235 A. 2d at 403.

It is readily apparent that at the hearing on January 4, 1966, the union had no intention of seriously raising the issue of federal preemption. It presented no evidence to prove either that "the employer was engaged in interstate commerce" [19] or "that the challenged activities were expressly or arguably within the jurisdiction of the NLRB." The fact is, contrary to the requirement of proof so clearly set forth by the Supreme Court of Pennsylvania, that jurisdiction of the National Labor Relations Board is altogether unascertainable from the complaint and the record in this matter.

In *Lay*, the Supreme Court of Pennsylvania held that the matter was subject to exclusive Labor Board jurisdiction. In doing so, it discussed in detail the preemption decisions of this Court.

It is clear therefore that the Supreme Court of Pennsylvania has extensive expertise on the subject of federal preemption in labor matters.[20] Had the union raised the defense, the court would have "addressed itself to the question." The detailed and thorough discussion of the pre-

[19] At the Hearing, the union cross-examined Weis' Assistant General Superintendent at length (R. 38-48). It would have been a simple matter to adduce evidence through him on the subject of interstate commerce, or to propose a stipulation.

[20] Similarly, its expertise extends to other areas concerning federal supersession. See that court's extensive analysis of this question in *Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133, affirmed 350 U.S. 497, where, in finding federal supersession, it stated:

"(W)e are met at the outset with this question which was *pressed timely in the trial court, was urged upon the Superior Court on appeal and has been stressed before us.*" 377 Pa. at 64, 104 A. 2d at 136. (Emphasis added.)

emption question by the Supreme Court of Pennsylvania in *Lay* demonstrates the very reason for this Court's waiver doctrine. The state courts should be given the opportunity to evaluate and decide all of the litigants' arguments before this Court is called upon to make a determination.

C. *Since The Union Failed To Raise The Defense Of Federal Preemption Before The Supreme Court Of Pennsylvania, It May Not Be Raised Before This Court.*

In the leading preemption cases, this Court has consistently made clear the fact that the preemption defense had been raised in the state courts below and had not been waived or abandoned. *Vaca* v. *Sipes,* 386 U.S. 171, 173; *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 187; *Hattiesburg Bldg. & Trades Council* v. *Broome Co.,* 377 U.S. 126; *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 303; *Carey* v. *Westinghouse Corp.,* 375 U.S. 261, 263; *Division 1287, Bus Employees Ass'n* v. *Missouri,* 374 U.S. 74, 77; *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 692; *Local 438, Construction Union* v. *Curry,* 371 U.S. 542, 545; *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 196; *Marine Engineers Ass'n* v. *Interlake Steamship Co.,* 370 U.S. 173, 176; *Plumbers' Union* v. *County of Door,* 359 U.S. 354, 355; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 238; *Guss* v. *Utah Labor Bd.,* 353 U.S. 1, 5; *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.,* 353 U.S. 20, 22. The consistent noting that the defense of preemption was raised below underscores its significance.

The instant case is unlike a diversity case in the federal district courts where the fact of diversity of citizenship is so fundamental that it cannot be waived. This is not a case where the issue is the basic elementary jurisdiction

of a court. Under the rulings of this Court, a state court through the exercise of its equity power can still issue injunctions in labor cases. *International Bhd. of Teamsters* v. *Vogt, Inc.*, 354 U.S. 284; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *UAW* v. *WERB*, 351 U.S. 266; *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740. The Pennsylvania courts therefore had the power to act here.

The allegation that a court has exceeded its power, is a defense which, if not raised, is considered waived. This Court has held innumerable times that it will not entertain the defense that a state court has unconstitutionally exceeded its power, if such defense has not been first presented to the State Supreme Court. *Beck* v. *Washington*, 369 U.S. 541; *Wolfe* v. *North Carolina*, 364 U.S. 177; *State Farm Mut. Auto Ins. Co.* v. *Duel*, 324 U.S. 154.

There is no valid reason for this Court to change or modify its long standing policy, propounded in detail above, that defenses not raised in the State Supreme Court cannot be raised here. Accordingly, since the defense of federal preemption was not raised before the Supreme Court of Pennsylvania, it may not be raised here.

POINT VII

ASSUMING, ARGUENDO, THAT PREEMPTION MAY PROPERLY BE RAISED BEFORE THIS COURT, THE SUPREME COURT OF PENNSYLVANIA IS NOT PREEMPTED IN THE CIRCUMSTANCES OF THE INSTANT CASE.

A. *The Picketing Did Not Violate Any Section Of The Labor Management Relations Act.*

1. The complaint did not allege that the union had engaged in unfair labor practices.

The complaint alleged that the union caused large numbers of persons to congregate in front of the store and in the parcel pick-up area (par. 6). The complaint also alleged that a no-trespassing notice had been posted (par. 11), that the union had been advised of it (par. 10) but that, notwithstanding, the union continued to trespass (par. 12) (R. 8-10).

Nowhere in the complaint was there an allegation that the union had committed an act which constituted an unfair labor practice, nor were there any acts complained of which could be interpreted as constituting unfair labor practices.

2. The union's Motion to Dissolve did not specify any particular unfair labor practice.

In its Motion, the union only adverted to "an unfair labor practice," in its generic sense. Not until this matter reached this Court, did the union specify any particular section of the Act. It is obvious, therefore, that its belated particularization of two alleged unfair labor practices was an afterthought. The union made no argument and offered no evidence during the hearing as to what conduct it was claiming it had engaged in which constituted an un-

fair labor practice, nor what sections of the Act it was violating. This mute position should be contrasted with its extensive argument here (Brief for Petitioners, pp. 30-56.) Regardless of whether its failure to raise the defense of preemption constituted a waiver, its bare assertion—and nothing more—until here, is evidence, at the least, that heretofore it considered this defense jejune.

3. The asserted unfair labor practices are confined to two sections of the Act.

In the Appendix to its Brief, the union sets forth two sections of the Labor Management Relations Act on which it relies, Section 8(b)(4) and Section 8(b)(7). Therefore, "the first inquiry . . . must be whether the conduct called into question may *reasonably* be asserted to be subject to Labor Board cognizance." *Local 100, Plumbers' Union* v. *Borden,* 373 U.S. 690, 694. (Emphasis added.) We shall show that the union's conduct did not violate either section, either in fact or arguably.

(a) *Section 8(b)(4)*

The conduct which this Court has been asked to review was primary, not secondary. The picketing took place immediately in front of the Weis store, and the name "Weis Markets" was clearly identifiable on the signs (R. 89). The picketing was "for the purpose of informing the public of the terms and conditions of employment of the employees of Weis Markets, Inc. at said store . . ." (See Motion to Dissolve (R. 23).)

There was no allegation in the complaint, nor does the record reveal any attempt by the union to "induce . . . any (employee) to strike . . . or refuse to . . . perform any service;" nor did the union "threaten, coerce, or restrain any person," as provided in the statute.

The union concedes that *this* primary picketing did not violate Section 8(b)(4) of the Act. Its contention is that, if it is *required* to picket at the entrances to the shopping center, a "secondary situation" *might* be created. (Brief for Petitioners, p. 42.) It does not contend, however, that this "secondary situation" is unlawful. Nor does the union contend that it would not picket at the entrances, of its own volition. What it seeks to do is reserve to itself the option to picket at the storefront *and* at the entrances.

Of course, the issue is whether the picketing from December 17, 1965, through December 27, 1965 in front of the Weis store, was a secondary boycott.[21] This was the activity enjoined, not the subsequent picketing at the berms, which was permitted. Whether a "secondary situation" was created by the court's order is not the question, "(n)or will (this Court) assume in advance that a State will so construe its law as to bring it into conflict with the Federal Constitution or an Act of Congress." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740, 746.

The union evinces a concern about the "entanglement of others" and "exposing neutral employers to picketing in a controversy not their own." (Brief for Petitioners, p. 42, 55.) It lists seventeen enterprises presently occupying the center. (Brief for Petitioners, p. 3.) This of course does not appear in the record; if this be so, it may be noted

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[21] The National Labor Relations Board (unlike the union) apparently contends that the picketing in front of the store, "might be . . . proscribed by Section 8(b)(4)(B) of the Act." Its thesis is that "since the shopping center where the picketing was conducted had employers other than Weis, the Union was obligated to conduct its picketing with due regard for the right of those other employers. . . ." (Brief for National Labor Relations Board, p. 8.) It is possible that this statement was inartistically drawn and that the Board was referring to the picketing that took place after the issuance of the injunction.

that from the time the trial court directed the picketing to the four entrances to the center on December 27, 1965, until the picketing ceased on June 8, 1967, none of these tenants had filed an unfair labor practice charge objecting to the picketing. Moreover, Logan, the owner, has raised no objection. It is before this Court seeking affirmance of the decision below.

That the unions professed concern about neutral employers is a stratagem, is evidenced by its statement at page 44 of its Brief where it states, inconsistently, "if the picketing at the common situs is otherwise primary, *it is of no moment that neutral employers may suffer* because the picketing, though properly circumscribed, may nevertheless envelop their operations." (Emphasis added.)[22]

(b) *Section 8(b)(7)*

This section condemns, as unlawful, picketing for recognition—i.e. picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization." Was the object of the union's picketing "to force or require Weis to recognize or bargain with it?" The answer must be negative. The complaint con-

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[22] The union cites *Honolulu Typographical Union No. 37* (Hawaii Press Newspapers), 167 N.L.R.B. No. 150, as support for its argument that picketing outside of a shopping center presents questions of secondary activity. In *Honolulu,* a union had a "dispute" with a newspaper publisher (the primary employer). In aid of this primary dispute, it attempted to exert secondary pressure (picketing) upon five advertisers, whose businesses were located within a shopping center. The instant matter is not concerned with primary and secondary employers. The only employer involved is Weis. The union is not picketing Weis because it has a dispute with any other employer. The union in *Honolulu* also parked a flat bodied truck in front of the shopping center, upon which a series of Hawaiian, Tahitian and Samoan musicians and dancers gave free performances. We trust that this is not the type of activity the union is suggesting should be permitted to take place in the parcel pick-up zone in front of Weis' store.

tained no such allegation and there was no evidence to this effect in the record. On the contrary, the union alleged that the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ," (R. 22-23).

Further condemned as unlawful is organizational picketing, i.e. picketing "where an object thereof is forcing or requiring the employees of the employer to accept or select such labor organization." Was the object of the picketing to "force or require the employees of Weis to accept the union?" Again, the answer must be negative. There was no such allegation in the complaint. Furthermore, the record is completely barren of any reference to organizational activity on the part of the union, such as the solicitation of signatures from Weis employees on authorization cards, conversations with them by union representatives, on or off the picket line, seeking their support or affiliation, or any of the numerous other ways in which a union organizes. On the contrary, as asserted by the union, the picketing was "nothing more than . . . informational picketing . . . for the purpose of informing the public . . ." (R. 22-23). This limited purpose has been consistently set forth by the union in its argument before the lower courts and here.

In its Brief to the trial court, the union stated:

> "The activity complained of . . . amounts to nothing more than peaceful, informational picketing by union members for the purpose of informing the public. . . ." (Brief, p. 1.)
>
> "The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 3.)
>
> "Such a message is designed to inform the public only. Such a message may be embarrassing to Weis . . . how-

ever, there is certainly no element of coercion on them to compel their employees to join a union." (Brief p. 3.)

In its Brief to the Supreme Court of Pennsylvania, the union stated:

"The activity complained of by the appellee amounts to nothing more than peaceful, informational picketing. . . ." (Brief, p. 7.)

"It is further quite clear that . . . (the) picketing is for the purpose of inducing plaintiff's customers to discontinue patronage. . . ." (Brief, p. 8.)

"It therefore appears that mere information picketing by union members for the purpose of informing the public. . . ." (Brief, p. 9.)

"The pickets here involved have been carrying signs directed to the public. . . ." (Brief, p. 10.)

Again, in its Brief here, the union described the purpose of its picketing as:

"peaceful picketing . . . informing the public. . . ." (Brief for Petitioners, pp. 2, 55.)

Finally, the union representative, when asked to describe "what type of picketing it is" testified that "it is strictly informational directed to the public" (R. 54).

Thus, the fact that the picketing was "informational" as contrasted with "organizational" or "recognitional" precludes the finding of an 8 (b)(7) violation. For "the thrust of all the Section 8(b)(7) provisions is only upon picketing for an object of recognition or organization, and not upon picketing for other objects." *International Hod Carriers,*

Local 840 (C.A. Blinne Const. Co.), 135 N.L.R.B. 1153, 1159.[23]

In its *amicus* brief, the Board acknowledges that informational picketing does not violate 8(b)(7)(C):

> "Moreover, if the picketing were found not to be recognitional or organizational in nature, but merely to protest the failure of Weis to conform to working standards prevailing in the area,[24] the picketing would not be within Section 8(b)(7)(C) at all. See *Houston Bldg. & Construction Trades Council (Claude Everett Construction Co.)*, 136 NLRB 321." (Brief for the National Labor Relations Board, p. 8.)

Thus, the union did not even arguably violate any section of the Labor Management Relations Act when it picketed in the parcel pick-up zone. The state courts were, therefore, not preempted by Federal law from acting.

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[23] "The principal requirement for an 8(b)(7) violation is that 'an' object of the picketing be 'forcing or requiring' the employer to recognize the picketing union as his employees' bargaining agent, or 'forcing or requiring' the employees to organize as members of the union." *NLRB* v. *Suffolk County District Council of Carpenters*, Docket Nos. 31151, 31152, 2d Cir., December 13, 1967, p. 649.

[24] It should be noted that the picket signs did not, *in haec verba* "protest the failure of Weis to conform to working standards prevailing in the area." The signs stated that: "(Weis) employees are not receiving union wages or other union benefits" (R. 89). This was true. Weis employees were not receiving wages or benefits resulting from union representation. Their wages were higher, and their benefits greater.

B. *Many Areas Of Labor Activity Remain Subject To State Regulation.*

Through the "process of litigating elucidation" this Court has "translated into concreteness" "what has been taken from the States and what has been left to them." *International Ass'n of Machinists* v. *Gonzales*, 356 U.S. 617, 619.

Of course, "the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had theretofore rested with them. *But the other half of what was pronounced in Garner —that the Act 'leaves much to the states'—is no less important.*" *International Ass'n of Machinists* v. *Gonzales, supra*, at 619. (Emphasis added.)

We shall show that the "implications of exclusive federal authority" do not extend to the narrow area in which this state court acted. We shall show that "the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility. . . ." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244. Finally, we shall show that there was no transgression by Pennsylvania upon national labor policy. Therefore "in (view of) the absence of compelling congressional direction," this Court will "not infer that Congress had deprived (Pennsylvania) of the power to act." *San Diego Bldg. Trades Council* v. *Garmon, supra*, at 244.

We start with a review of this Court's decisions holding that where activity is either a "peripheral concern of the Labor Management Relations Act," "deeply rooted in local feeling and responsibility," or there exists an "overriding state interest," the State may regulate it. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236; *Local 100, Plumbers' Union* v. *Borden*, 373 U.S. 690.

1. State court action for libel published during union organizing campaign.

This Court held that the exercise of state jurisdiction over malicious libels would be of "peripheral concern" to the Labor Management Relations Act. In addition, this Court recognized "an overriding state interest" in protecting its residents from malicious libels. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 61.

2. State court action by employees for malicious interference with lawful occupation.

This Court held that:

"(A)n employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be preempted without a clearer declaration of congressional policy than we find here." *International Union, UAW* v. *Russell,* 356 U.S. 634, 646. (Emphasis in original.)

3. State court action by employee for wrongful expulsion from union membership.

This Court held that:

"(T)he potential conflict (between a state court's award of damages and restoration to membership, and an NLRB proceeding) is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." *International Ass'n of Machinists* v. *Gonzales,* 356 U.S. 617, 621.

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4. State action prohibiting mass picketing and interference with free use of public streets and sidewalks.

This Court noted that it was dealing with:

"a State . . . exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. . . . We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

* * *

"(W)e (cannot) say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive . . . as to prevent Wisconsin . . . from supplementing federal regulation in the manner of this order."

* * *

"(T)he state system of regulation . . . can be reconciled with the federal Act and . . . the two . . . can consistently stand together. . . ." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB,* 315 U.S. 740, 749-51.[25]

5. State court regulation of organizational picketing directed toward supervisors.

This Court stated that "secondary pressure wielded to impose representation on unwilling supervisors, finds itself at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193, n. 14.

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[25] In *UAW* v. *WERB,* 351 U.S. 266, 274, this Court stated that: "The fact that the Labor Management Relations Act covered union unfair practices for the first time does not make the *Allen-Bradley* case obsolete."

6. State court action by employee alleging breach of union duty of fair representation.

This Court stated that it could not assume "that Congress, when it enacted N.L.R.A. Sec. 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." *Vaca* v. *Sipes*, 386 U.S. 171, 183. Citing *Linn, Russell, Gonzales, Allen-Bradley,* and *Hanna,* this Court stated that these cases:

> "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies. *Vaca* v. *Sipes, supra* at 180.

7. State Board action based on violence.

This Court stated:

> "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect." *UAW* v. *WERB*, 351 U.S. 266, 274-75.

8. State court action based on violence.

This Court held:

> "If petitioners were unorganized private persons conducting themselves as petitioners did here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations, with no contractual relationship with re-

spondent or its employees, provides no reasonable basis for a different conclusion." *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 669.

9. State court action by employee against employer for breach of union contract.

This Court stated:

"If . . . there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them . . . ." *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197-98.

We submit that the rationale of these cases establishes that there is no basis for extension of the preemption concept to the circumstances of this case.

C. *Pennsylvania's Deeply Rooted Interest In Protecting The Property Of Its Citizens Should Not Be Abrogated.*

The Supreme Court of Pennsylvania expressed the State's deeply rooted feelings with respect to regulating the use of property, as follows:

> "That the Commonwealth has not only the *power* but the *duty* to *protect* and *preserve* the property of its citizens from invasion by way of trespass is clear beyond question. *Thornhill* v. *Alabama*, 310 U.S. 88, 105. . . ." (R. 104). (Emphasis added.)

The citation of *Thornhill* reveals the origin of the words "power," "duty," "protect" and "preserve." For it was in *Thornhill* that this Court underscored state authority to regulate the use of property:

> "The *power* and the *duty* of the State to take adequate steps to *preserve* the peace and to *protect* the privacy, the lives, and the property of its residents cannot be doubted." 310 U.S. 88, 105. (Emphasis added.)

The choice of these 'words of power' by the Supreme Court of Pennsylvania, standing alone, reflects the depth of its feelings and interest.

The National Labor Relations Board concedes that "a State has a legitimate interest in protecting private property against trespass," but argues reversal because "here the State is not undertaking to protect its citizens against unwanted intruders in the customary sense. . . ." (Brief for the National Labor Relations Board, p. 17.) On the contrary, the Commonwealth's statement that it has "the duty to protect and preserve the property of its citizens from invasion" (R. 104) reflects its understanding of its obliga-

tion. Certainly, the Supreme Court of Pennsylvania is acting in the customary sense when it protects its citizens' property interests from trespass.[26] This strongly expressed interest should not be abrogated, for "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47.

Furthermore, here the trial court enforced an injunction aimed narrowly at a trespass, but permitted the continuation of non-trespass picketing. It has been argued that this Court would approve such an injunction. In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, the Ohio court's *broad* injunction against picketing within a shopping center was considered improper. This Court held that Ohio was clearly preempted from enjoining the union's conduct *"in its entirety."* However, it left open the question "whether a state may frame and enforce an injunction aimed narrowly at a trespass. . . ." It remanded for further proceedings, observing that "whether (the Ohio court's) conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." 353 U.S. at 24-25.

It is possible, of course, that this Court did not want to reach and decide this question at that time. However, it may reasonably be argued, as did four members of the Washington Supreme Court, that "unless the court there (*Fairlawn Meats*) believed it possible to frame an injunction and enforce an injunction aimed narrowly at a tres-

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[26] States have resolved questions concerning real property since this nation was founded. The overriding interest of states in resolving disputes concerning the use of real property, and specifically the right of state courts to enjoin unlawful trespasses, cannot be disputed. See 43 C.J.S. *Injunctions*, §64 (1945), reporting 140 cases involving trespass actions instituted in 34 different states.

pass, it did a vain and useless thing in making a remand to the state court." *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 434, 363 P. 2d 803, 807-08 (concurring opinion). Thus it may be said that this Court would not have remanded if a narrow injunction against trespass was preempted. Nor would this Court have remanded if the entire scope of the union's activity, including the trespass, were protected under Section 7 of the Act.

The Board concedes that "indoor picketing" [27] is not protected by the Act. In its *amicus* brief (p. 17) it stated:

> "Assume, for example, that outside organizers or pickets entered the selling area of the Weis store and disrupted its business. The interest of the State in providing a remedy for that conduct is so great and the danger of interference with the federal regulatory scheme is so slight that the State would not be barred from acting, notwithstanding that a federal remedy might also be available."

As stated at page 11, *supra,* the pickets interference with the merchandising operation in the parcel pick-up zone was as much a disruption of Weis' business, as would be their entrance into the selling area. If the protection of the Act did not extend to picketing in the selling area causing a disruption of business, it similarly did not extend to the disruption of business caused by pickets in the parcel pick-up zone.[28] The State's interest is so great and the degree of

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[27] The phrase "indoor picketing" is the Board's. See *Gimbel Bros., Inc.*, 100 N.L.R.B. 870, 877, cited in Brief for the National Labor Relations Board, p. 17 n. 16.

[28] Nor would the Act's protection extend to picketing on the porch. See comment by Supreme Court of Pennsylvania, that they "do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5).

interference with the federal regulatory scheme so slight that the State courts should not be barred from acting here.

D. *There Was No Transgression Upon The National Labor Policy.*

The touchstone of most of the preemption cases before this Court is whether the state action might transgress upon the national labor policy. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53.[29]

The "national labor policy" may be readily found in Section 1 of the National Labor Relations Act.

> "The policy of the United States . . . (is to) encourage the practice and procedure of *collective bargaining* and (to) protect the exercise by workers of full freedom of association, *self-organization* and designation of representatives of their own choosing. . . ." (Emphasis added.)

In this case we have an absence of collective bargaining or organizational activity. We have only informational picketing to communicate to the public that the employees in the store do not belong to the picketing union.

We do not even have a labor dispute. Logan was not involved in a labor dispute. The trial court noted: "Neither plaintiff Logan Valley Plaza, Inc. nor Sears are parties to a labor dispute nor involved in any labor trouble" (R. 90). Weis was not involved in any labor dispute. The

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[29] As one commentator has noted: "Nonetheless, the only variable in the formula is the interest asserted by national labor policy; any legitimate state interest, whether grave or trivial, will support state remedies given a less than substantial federal interest." Currier, *Defamation in Labor Disputes: Preemption And The New Federal Common Law,* 53 Va. L. Rev. 1, 11 n. 47 (1967).

trial court held that: "Weis . . . is not engaged in labor trouble" (R. 92). Furthermore, it was incontrovertibly testified that Weis was not involved in a labor dispute (R. 37). This absence of a labor dispute further distinguishes this case from other cases where this Court has found preemption.[30]

Furthermore, the parties to this action had no relationship, other than as litigants. Accordingly, there is "no need for concern over the climate of labor relations that (this) action might impair." *International Union, UAW* v. *Russell,* 356 U.S. 634, 656 (dissenting opinion). Thus on its facts, this case stands "at that far corner of labor law where . . . federal occupation is at a minimum and state power at a peak." *Hanna Mining Co.* v. *District 2, Marine Engineers Ass'n,* 382 U.S. 181, 193 n. 14.

[30] This is not a case involving an "economic strike by employees, a sphere in which federal interest is especially pervasive." (*Hanna,* 382 U.S. at 193 n. 14, commenting on *Teamsters* v. *Morton,* 377 U.S. 252). Nor does it involve picketing to compel execution of a union shop agreement (*Garmon*), or picketing in the context of a jurisdictional dispute (*Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468).

E. *Pennsylvania Should Be Permitted To Exercise Its Inherent Equity Powers.*

It cannot be denied that a state must be allowed to "exercise the historic powers over such traditionally local matters as public-safety and order, the use of streets and highways." *Allen-Bradley Local 1111, United Electrical Workers* v. *WERB*, 315 U.S. 740. To the same effect, see *International Union, UAW* v. *Russell*, 356 U.S. 634 (dissenting opinion).

Similarly, in *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139, this Court sustained a state court injunction which, in part, prohibited the union from "obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property. . . ."

In the instant matter, the picketing created acute congestion, presented a hazard to customers, and obstructed their free ingress and egress from the store (R. 44). *Whether Weis' property in this case is considered private, quasi-public or public, Pennsylvania should have the right to guarantee to the public the free and uninhibited use and access to this property.*[31]

The equity jurisdiction of a local court is especially suited to the type of control, regulation and accommodation of interests that arise in this type of case. It is "on the scene" and is familiar with the premises. In seeking an accommodation, it can discuss the respective positions with counsel in chambers, and work out an acceptable formula for the location and number of pickets.

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[31] The Supreme Court of Pennsylvania expressly held that Weis' parcel pick-up zone was private, and not quasi-public, property (R. 104-106). We, of course, agree.

The trial court need not issue a "cease and desist" order prohibiting all picketing, as does the National Labor Relations Board when it prohibits picketing. The court can, and did, permit picketing to continue; it can limit the numbers and provide that entrances shall not be obstructed. This type of order is especially suited to the flexible handling of a local court of equity. As this Court has stated in another context: "(I)t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts. . . ." *Vaca* v. *Sipes*, 386 U.S. 171, 181.

There is further justification for permitting the state court to act in this case. A tort was committed—trespass. The state courts have so found, and it is not seriously disputed. The state court remedied the tort through its Order. The Board cannot remedy it at all. There is no unfair labor practice of trespass. Therefore,

> "To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." *United Construction Workers* v. *Laburnum*, 347 U.S. 656, 665.

Furthermore, the Board's inability to remedy the tort of trespass might lead to other untoward consequences—self-help. This Court adverted to such a possibility when it stated:

> "The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the

victim to take matters into his own hands." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 64 n. 6.[32]

In the instant matter, the Assistant General Superintendent of Weis advised the pickets that they were picketing on private property and requested that they picket on the berm of the road. The pickets disregarded this notice to desist and continued to picket as before (R. 32-33). The instant proceeding resulted.

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[32] The Supreme Court of Illinois made a similar observation in upholding the conviction of union representatives' trespass on a retail store's parking lot:

"When a person refuses to leave another's property after he had been ordered to do so, a threat of violence becomes imminent. The defendants were on property occupied by Sears, Roebuck and Company. The company's agent believing the defendants had no right to be on the property ordered them to leave three times. The defendants believing they had a right to be there refused to leave. At this point, the Company called the police. If the State had not taken charge of the situation, the Company would have had no alternative but to forcefully remove the defendants. We cannot know the amount of force that would have been necessary to remove them, but the threat of violence in such a situation is imminent." *People* v. *Goduto*, 21 Ill. 2d 605, 609-10, 174 N.E. 2d 385, 387, *cert. denied*, 368 U.S. 927.

CONCLUSION

This Court has observed in one case that the employer's "motive in asking help from the state is . . . merely a desire to keep its plant in operation." *International Union, UAW* v. *WERB,* 336 U.S. 245, 256.

This is all that Weis seeks. Its motive in seeking judicial aid is wholly defense. *It merely wants to keep its store in operation.*

Weis obtained relief from its ordeal on December 27, 1965. Had it been denied, and the trespass complained of continued, its newly opened store in Altoona, Pennsylvania, would today be **closed,** its business **terminated,** its customers **dispersed,** and its employees **discharged.**

These undesirable results were properly obviated by the Pennsylvania courts. We urge affirmance.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

On Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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INDEX

ARGUMENT — Page

I. Respondents' Variations On The Conclusory Theme Of Trespass, And Their Fictive View That The Picketing Was Physically Obstructive Rather Than Peaceful 1

II. Respondents' Untenable Position That The Preemption Question Is Not Properly Before This Court 10

TABLE OF CITATIONS

CASES:

Appeal of Borough of Schuylkill Haven, 179 Pa. Super. 508, 118 A. 2d 242 12
Carlson v. California, 310 U.S. 106 2
C.I.O. v. McAdory, 325 U.S. 472 14
Cox v. Louisiana, 379 U.S. 536 8
Freeman v. Retail Clerks Union, Local No. 1207, 58 Wash. 2d 426, 363 P. 2d 803 11
Gainesville v. Brown-Cummer Investment Co., 277 U.S. 54 14
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 14
Hanna Mining Co. v. M.E.B.A., 382 U.S. 181 16
Hood v. Stafford, 213 Tenn. 684, 378 S.W. 2d 766 11
In re Application of Rita T. Chambers, 399 Pa. 53, 159 A. 2d 684 12
In re Gilbert's Estate, 350 Pa. 13, 38 A. 2d 277 12
In re Green, 369 U.S. 689 14
Iron Workers v. Perko, 373 U.S. 701 11
Kesler v. Department of Public Safety, 369 U.S. 153 .. 14
Liner v. Jafco, 375 U.S. 301 ..... 14, 17
Local No. 438, Construction Union v. Curry, 371 U.S. 542 16
Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 .. 11
Local 24, Teamsters v. Oliver, 358 U.S. 283 3
Magel v. Springs, 338 Pa. 452, 12 A. 2d 558 12
Marsh v. Alabama, 326 U.S. 501 3
Matson Navigation Co. v. United States, 284 U.S. 352.. 14
McCann v. Philadelphia Fairfax Corp., 344 Pa. 636, 26 A. 2d 540 11

Page

McCoach v. City of Philadelphia, 372 Pa. 317, 117 A. 71 12
McCulloch v. Sociedad Nacional De Marineros De Honduras, 372 U.S. 10 15
McGrath v. Kristensen, 340 U.S. 162 14
Meat Cutters v. Fairlawn Meats, 353 U.S. 20 10
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 4
Mitchell v. Maurer, 293 U.S. 237 14
Moreland Corp. v. Retail Store Employees Union Local No. 444, 16 Wis. 2d 499, 114 N.W. 2d 876 15
Nash v. Florida Industrial Commission, No. 48, October Term, 1967, December 5, 1967 14
N.A.A.C.P. v. Button, 371 U.S. 415 3
N.L.R.B. v. Hearst Publications, 322 U.S. 111 3
Pennsylvania Labor Relations Board v. Frank, 362 Pa. 537, 67 A. 2d 78 13
People v. Goduto, 21 Ill. 2d 605, N.E. 2d 385, cert. denied, 368 U.S. 927 11
Pittsburgh Railways Case, 357 Pa. 379, 54 A. 2d 891 .. 13
Plumber's Union v. Borden, 373 U.S. 690 11
Provident Tradesmens Bank & Trust Co. v. Patterson, 36 U.S. Law Week 4157 (S. Ct. January 29, 1968) 14
Rabouin v. N.L.R.B., 195 F. 2d 906 (C.A. 2) 3
San Diego Building Trades Council v. Garmon, 359 U.S. 236 ..... 3, 11
Seaboard Air Line Co. v. Daniel, 333 U.S. 118 14
State Farm Mutual Automobile Ins. Co. v. Semple, 407 Pa. 572, 180 A. 2d 925 12
Staub v. Baxley, 355 U.S. 313 13
Taylor v. Haverford Tp., 299 Pa. 402, 149 A. 639 12
Thornhill v. Alabama, 310 U.S. 88 ..... 5, 8
Tucker v. Bienenstock, 310 Pa. 254, 165 A. 247 11
United Mine Workers v. Gibbs, 383 U.S. 715 ..... 5, 8
Ward v. Love County, 253 U.S. 17 13
Weber v. Anheuser Busch, 348 U.S. 468 3
Youngdahl v. Rainfair, 355 U.S. 131 ..... 5, 8

MISCELLANEOUS:

Restatement, Torts, § 779 (1939) 5

9 Standard Pennsylvania Practice 339, 340, 362-363 .. 11, 12

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS' VARIATIONS ON THE CONCLUSORY THEME OF TRESPASS, AND THEIR FICTIVE VIEW THAT THE PICKETING WAS PHYSICALLY OBSTRUCTIVE RATHER THAN PEACEFUL.

At the premises of a store located within a shopping center union workmen engaged in peaceful picketing informing the public that the store "is Non-Union, these employees are not receiving union wages or other

union benefits." "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. . . . [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." *Carlson* v. *California,* 310 U.S. 106, 112-113. A state court injunction which prohibits that picketing therefore prima facie clashes with freedom of expression and hence requires the proponents of the ban to justify the suppression. But respondents do not confront the issues which this clash poses. For, on the analytical level, they do no more than play variations on the conclusory theme of trespass, and, on the factual level, they indulge the fiction that the picketing that was prohibited was physically obstructive rather than peaceful.

1. Because the picketing was conducted on privately-owned but publicly-used property, the courts below characterized it as a trespass, and respondents would justify prohibition of the picketing in reliance on that bare classification (res. br. pp. 23-24, 52). To affix the local label of trespass to the enjoined conduct does not answer the question whether the State has impaired freedoms protected by the Federal Constitution or taken in hand activity that Congress has by statute preempted or safeguarded. "Title to property as defined by State law controls property relations; it cannot control issues of civil liberties. . . . And similarly the technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decisions

regarding the scope of the vital liberties guaranteed by the Constitution." Mr. Justice Frankfurter concurring in *Marsh* v. *Alabama,* 326 U.S. 501, 511. And so, as this Court held in the latter case, "determination of the issue of 'dedication' does not decide the question under the Federal Constitution here involved" (*id.* at 505, n. 2).

The same is true of the question under the National Labor Relations Act. "Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated local problems. Consequently, . . . 'the federal law must prevail no matter what name is given to the interest or right by state law.'" *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111, 123-124. The "vagaries of state rules of law may not override provisions of a federal act geared to the effectuation of an important national labor policy." *Rabouin* v. *N.L.R.B.,* 195 F.2d 906, 910 (C.A. 2). "Controlling and therefore superseding federal power cannot be curtailed by the state even though the ground of intervention be different than that on which federal supremacy has been exercised." *Weber* v. *Anheuser Busch,* 348 U.S. 468, 480; see also, *Local 24, Teamsters* v. *Oliver,* 358 U.S. 283, 297; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, 244 and n. 3.

In short, "a state cannot foreclose the exercise of constitutional [or other federal] rights by mere labels." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 429. Here peaceful picketing was conducted on privately-owned but publicly-used property; the occasion for the picketing

was the disfavored labor policy practiced by the store in front of which the picketing was conducted; the message which the picketing imparted publicized the store's disapproved non-union status; and the vicinity of the store was the natural and effective place to communicate that message pertaining to that store and its labor policy. And so, the picketing was peaceful; the place was public; and the nexus of the picketing to that public place was direct in relationship to the originating cause of the picketing, the disfavored condition at which the picketing was aimed, and the audience that it was designed to reach. This was in pristine form peaceful persuasion through picketing and it takes more than the cry "trespass to property" to justify its ban.

2. A variant on the trespass theme departs from reliance on bare title to property as the identifying attribute of the trespass, and invokes instead avoidance of violence and preservation of domestic peace as the ends served by curbing trespass (res. br. pp. 57-58; ARF br. pp. 8-9, 21-24). But what the injunction in this case curbs as trespass is peaceful picketing. And it has been a very long time—and rarely even in the distant past—since it has been said that a risk of violence inheres in peaceful picketing and its outright ban is therefore justified on that account. This Court has upheld, only once and over vigorous dissent, a ban of peaceful picketing because it was enmeshed in a pattern of actual violence which gave the picketing a coercive effect whereby it would operate destructively as force and intimidation. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287. This ban of future peaceful picketing because of its past enmeshment in violence is highly exceptional. The usual

course, even when picketing is marred by violence, is to prohibit the violence but permit the picketing. *Youngdahl* v. *Rainfair,* 355 U.S. 131, 139-140; *U.M.W.* v. *Gibbs,* 383 U.S. 715, 729-732. But neither approach even comes to the fore unless there is actual violence. As here, therefore, when there is nothing but peaceful picketing, with no violence attendant upon its conduct, this Court has never sanctioned its ban because of an unmaterialized risk of violence supposedly inherent in all picketing at all times and everywhere. It has, indeed, expressly rejected just this view. *Thornhill* v. *Alabama,* 310 U.S. 88, 105. It is late in the day to resurrect the argument now. In our industrial society peaceful picketing has long since been identified with unimpeachable orthodoxy as "fair persuasion."[1]

In short, what respondents come down to saying is that peaceful picketing on publicly-used but privately-owned land is a trespass, that trespass is prohibitable in order to prevent violence, and that therefore peaceful picketing may be banned as a means of preserving domestic peace. This argument begins with a question-begging conclusory characterization, fills that abstraction with a content foreign to the actual conduct which it is supposed to classify, and ends with a conclusion which incorporates a faulty premise and an erroneous deduction from it. Concretely stated, banning peaceful picketing on publicly-used but privately-owned property serves whatever interest there may be in bare dominion over property but has nothing to do with preventing violence. It takes more than respondents' illogical shift from bare title to violence to justify the suppression of peaceful picketing.

---

[1] Restatement, Torts, § 779 (1939).

3. The main burden of respondents' defense of the ban of picketing at the store's premises is based on the view that the picketing, said to have been conducted by thirteen pickets walking four abreast, physically obstructed access to the pick-up zone and seriously impeded its normal functioning (res. br. pp. 3, 11, 12, 16, 17, 56). This version is foreign to the record, in conflict with the findings, and at odds with the rationale adopted by the courts below to support the injunction.

The Court of Common Pleas found that (R. 89-90):

> (7) Commencing on December 17, 1965 defendant union through its representatives, none of whom are employees of either plaintiff, engaged with continuity in the following acts of picketing on the Mall premises, inter alia:
>
> (a) *small groups* of men and women wearing placards reading "Weis Mkt is Non-Union these employees are not receiving union wages or other union benefits" walked back and forth in front of the Weis supermarket, more particularly in the pick-up zone adjacent to the covered porch [emphasis supplied];
>
> (b) occasional picketing as above described has taken place on the covered porch itself. . . .
>
> * * *
>
> (8) While such picketing has been persisted in and may have infrequently caused temporary congestion near the supermarket entrances or sporadic stoppage of the flow of vehicles in the pick up zone, and while the pickets refused a request by the Assistant General Superintendent for Weis Markets to move off the Mall proper, the picketing has been peaceful and unaccompanied by either oral threats or actual violence.

The Court of Common Pleas thus flatly found that "the picketing has been peaceful and unaccompanied by either oral threats or actual violence." This unequivocal finding was introduced by the pale qualification that the picketing "*may have infrequently* caused *temporary* congestion . . . or *sporadic* stoppage of the flow of vehicles in the pick up zone . . ." (emphasis supplied). To find that picketing "may have" caused a condition is very far from finding that it did; and to find that the condition that "may have" been caused was brought about "infrequently" and was "temporary" or "sporadic" is very far from finding that it had a meaningful duration, much less that it continued uninterruptedly.

On appeal, the Supreme Court of Pennsylvania was emphatic that the picketing at issue was peaceful. It described the picketing as "concededly peaceful in nature" (R. 101); it observed that the "court below found, and it is established by the evidence, that the picketing was peaceful in nature" (R. 102); and it sustained the injunction "even though [the workmen] engaged in picketing of a peaceful nature" (R. 106). The Court of Common Pleas had enjoined the picketing because it constituted a trespass and was designed in part to coerce union membership (pet. br. pp. 7-8), and the Supreme Court of Pennsylvania upheld the injunction on the trespass ground alone (pet. br. pp. 9-10). Neither court, however, acted in any wise upon the view that the picketing was in any degree physically obstructive.

Respondents thus place their main reliance upon a mythical view of the picketing.[2] But even if the picketing were physically obstructive, all that respondents would be able to demonstrate on that premise would be a reason for limiting the number of pickets and delineating the particular places in the vicinity of the store at which they could walk. It would not justify the prohibition of all picketing at the store's premises. As a matter of constitutional right (*Thornhill* v. *Alabama*, 310 U.S. 88, 105-106), as well as of federal statutory protection (*Youngdahl* v. *Rainfair*, 355 U.S. 131, 137-140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729-732), an injunction must be narrowly drawn to reach only the physically obstructive aspects of the picketing, leaving its continuance at the situs of the

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[2] Illustrative is respondents' claim that thirteen pickets walked four abreast from December 17, 1965, when the picketing began, until December 27, 1965, when the picketing was enjoined *ex parte*. Respondents' own witness testified, however, that thirteen persons picketed only "on the night of December 21st, a Tuesday night", and walked on that night "Two [abreast], and sometimes they would go into 3 or 4" (R. 32; see also, R. 47). The same witness placed the average number of pickets at "6 and 7" (R. 39). The pick-up zone at which the workmen primarily picketed was 4-5 feet in width and 30-40 feet in length (R. 55, 101, n. 2). Parts (c), (d), (e), and (f) of the injunction are in terms addressed to physically obstructive picketing (R. 3, 20-21), but that injunction was issued *ex parte* (R. 102), and was continued in effect unchanged after an evidentiary hearing without advertence to the lack of correspondence between parts (c), (d), (e), and (f) of the injunction and the record (R. 99-100). The casualness with which these parts of the injunction were entered and continued is illustrated by the fact that the blank space in part (c) of the injunction specifying the number of pickets has never been filled in (R. 3, 20). We need hardly add that in adjudicating "a claim of constitutionally protected right" this Court's responsibility is "'to make an independent examination of the whole record.'" *Cox* v. *Louisiana*, 379 U.S. 536, 545, n. 8.

dispute otherwise unmolested. The situation is identical to that which would obtain if the Weis store fronted on a municipally-owned street. In that event, physically obstructive picketing would be controlled by limiting the number and location of the pickets in front of the store to allow unimpeded access, but unobstructive picketing in reasonable numbers at the store's premises would be permitted. The situation is no different because the Weis store fronts on a publicly-used but privately-owned street rather than on a publicly-used but municipally-owned street. Indeed, in this case, as would be true on municipally-owned ground, the ideal appropriate place to picket would be on the sidewalk in front of the Weis store, thereby eliminating any question of interruption of auto traffic flow at the pick-up zone.[3]

4. We return in the end to the question which this case presents. May a State prohibit peaceful picketing at the premises of a store within a shopping center because the property is privately-owned although publicly-used? It is that issue which must be faced and which respondents do not confront.

---

[3] Part of the sidewalk in front of the Weis store is overhung by a roof, and therefore called an "open but covered porch" (R. 88, res. br. p. 4), which presumably is designed to serve the same function as an awning. Based on the fact that picketing on the sidewalk was "occasional" (R. 89), the court below stated that, "We do not construe the Union's position to be that picketing on the porch of the Weis' property did not constitute a trespass" (R. 103, n. 5). The inference of the court below as to the Union's position is mistaken. There is no reason to distinguish for trespass purposes between a publicly-used sidewalk, a publicly-used pick-up zone, or a publicly-used parking lot within a shopping center.

II. RESPONDENTS' UNTENABLE POSITION THAT THE PREEMPTION QUESTION IS NOT PROPERLY BEFORE THIS COURT.

Respondents contend that the question of federal preemption was not properly pursued by petitioners on appeal before the Pennsylvania Supreme Court, and therefore may not be entertained by this Court (res. br. p. 29). The short answer is that, as preemption divests the state court of subject matter jurisdiction, the issue was sufficiently raised before the court below to comply with state standards for tendering a jurisdictional question, and that, even if it were not, this Court must decide a jurisdictional question whether or not raised below.

1. As respondents conceded in their opposition to certiorari (p. 9), the "Petitioners in their 'Motion to Dissolve or Modify Preliminary Injunction' before the Court of Common Pleas did raise the issue of preemption arguing that the complained of activity was removed from the sphere of state action by virtue of the Labor Management Relations Act." The conceded explicit tender of the preemption question to the trial court was incorporated in the printed record on appeal in the precise form that it had been raised at the *nisi prius* level (R. 26). Furthermore, in addition to its inclusion in the record on appeal, preemption was an express alternative ground articulated in the dissenting opinion below to support reversal (R. 111). And the view that preemption did not apply was forcefully argued by respondents themselves in their brief below.[4] In reliance on this Court's reservation of the question in *Meat Cutters* v. *Fairlawn Meats,* 353 U.S. 20, and

[4] Respondents have lodged this brief with the Clerk of the Court.

invoking the concurring opinion in *Freeman* v. *Retail Clerks Union, Local No. 1207,* 58 Wash. 2d 426, 363 P. 2d 803, respondents urged that the power of the lower court to issue an injunction addressed to trespass had not been preempted (res. br. below pp. 17-19). They similarly cited and quoted *People* v. *Goduto,* 21 Ill. 2d 605, 610, 174 N.E. 2d 385, cert. denied, 368 U.S. 927, and *Hood* v. *Stafford,* 213 Tenn. 684, 378 S.W. 2d 766, to sustain state power to regulate picketing as a trespass notwithstanding preemption (*id.* at 20-22). And they argued "tacit approval" by this Court, said to be inferable from this Court's denial of certiorari in *Goduto,* urging that the "Supreme Court has never hesitated to grant certiorari when it believes a state entered a forbidden area of labor relations. See e.g. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 . . .; *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 . . .; *Plumber's Union* v. *Borden,* 373 U.S. 690 . . .; *Iron Workers* v. *Perko,* 373 U.S. 701 . . ." (*id.* at 21). The preemption question was therefore plainly before the court below.

2. In these circumstances only a court that would not see could not see. The Pennsylvania Supreme Court is not that sightless court which puts on procedural blinders to shut from view what all men must perceive. ". . . [W]e cannot close our eyes", it says, to a "clearly disclosed" defect.[5] Even if not properly raised, it notices "a vital or fundamental error",[6] such as the illegality of a business[7] or the discretionary avail-

[5] *McCann* v. *Philadelphia Fairfax Corp.,* 344 Pa. 636, 26 A.2d 540, 542 (contributory negligence).

[6] 9 Standard Pennsylvania Practice 339 (rev. ed. 1962).

[7] *Tucker* v. *Bienenstock,* 310 Pa. 254, 165 A. 247, 249.

ability of the declaratory judgment remedy.[8] More to the point, whatever may be said of important but non-jurisdictional errors, the Pennsylvania Supreme Court always considers questions of subject matter jurisdiction although not embraced by the statement of questions involved or otherwise suggested by the parties. As it states, "Objections to jurisdiction over the subject matter at issue have been considered by this Court even where the question was not presented to the court below or initially raised on appeal."[9] Over and again it has noticed and decided as a matter of course questions of subject matter jurisdiction imperfectly raised or not raised at all.[10] In conformity

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[8] *Taylor* v. *Haverford Tp.*, 299 Pa. 402, 149 A. 639, 641; *State Farm Mutual Automobile Ins. Co.* v. *Semple*, 407 Pa. 572, 180 A.2d 925, 927.

[9] *In re Application of Rita T. Chambers*, 399 Pa. 53, 159 A.2d 684, 687.

[10] *McCoach* v. *City of Philadelphia*, 273 Pa. 317, 117 A. 71, 73 ("True, the question upon which we decide this case was not raised in the lower court, nor by counsel here; but, as it goes to the jurisdiction to grant the relief sought, we cannot ignore it."); *Magel* v. *Springs*, 338 Pa. 452, 12 A.2d 558, 559 ("While this objection was not made in the court below, the point is jurisdictional and should be noticed here."); *In re Gilbert's Estate*, 350 Pa. 13, 38 A.2d 277, 279 ("We note that the question of jurisdiction was not presented to the . . . court below . . . . We must, however, consider it."); 9 Standard Pennsylvania Practice 340 (rev. ed. 1962) ("A question which goes to the jurisdiction of the lower court to grant the relief sought, however, cannot be ignored on appeal even though it was not raised by counsel on the appeal."); *Id.* at 362-363 ("Jurisdiction of the subject matter cannot be conferred by estoppel, consent, or waiver. An objection of want of jurisdiction over the subject matter may even be raised for the first time on appeal."). And see, *Appeal of Borough of Schuylkill Haven*, 179 Pa. Super. 508, 118 A.2d 242, 243 ("The question of jurisdiction of the court of quarter sessions to make the order from which this appeal is taken would be considered by this Court although not presented to the court below or initially raised on this appeal.")

with that practice it has considered the question of the lack of jurisdiction of the Pennsylvania Labor Relations Board by reason of the exclusive jurisdiction of the National Labor Relations Board, although the question was not raised until after argument before the Pennsylvania Supreme Court,[11] or not raised before the State Board.[12]

There is, accordingly, no reasonably tenable basis for imputing to the court below a failure to consider the preemption question because of claimed insufficient adherence to state procedural rules. The preemption question was in plain view of the court below and it regularly considers and decides jurisdictional issues even if inartistically presented or not raised at all by the parties but noted *sua sponte*. Furthermore, in these circumstances, had the court below invoked a procedural bar as the reason for declining to consider the preemption question, the assertion of such a ground would be "without any fair or substantial support" in state rules (*Ward* v. *Love County*, 253 U.S. 17, 22), and therefore would not constitute an adequate nonfederal basis of decision (*Staub* v. *Baxley*, 355 U.S. 313, 318-320). There is, hence, no state procedural impediment to review here.

3. But even if the preemption question were insufficiently raised below, and that defect were the reason actually and justifiably invoked by the court below as the basis for not considering the question, review here would not be barred. Preemption goes to the power of the state court over the subject matter of the contro-

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[11] *Pittsburgh Railways Case*, 357 Pa. 379, 54 A.2d 891, explained in *Pennsylvania Labor Relations Board* v. *Frank*, 362 Pa. 537, 67 A.2d 78, 81.

[12] *Pennsylvania Labor Relations Board* v. *Frank*, 362 Pa. 537, 67 A.2d 78, 81.

versy (*In re Green*, 369 U.S. 689), and is therefore jurisdictional. It "involves the fundamental question of whether the . . . [state] courts *had any power whatever* to adjudicate the dispute between the parties. Congress has invested the National Labor Relations Board with the exclusive power to adjudicate conduct arguably protected or prohibited by the National Labor Relations Act." *Liner* v. *Jafco*, 375 U.S. 301, 306 (emphasis supplied). "Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time." *Gainesville* v. *Brown-Cummer Investment Co.*, 277 U.S. 54, 59. This Court has *sua sponte* passed upon a state court's jurisdiction although it had been conceded below and not questioned in this Court. *Seaboard Air Line Co.* v. *Daniel*, 333 U.S. 118, 122-123. It is this Court's unbroken practice to consider and decide a jurisdictional question even if not raised below or here.[13] In keeping with this practice this Court

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[13] *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209; *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 155; *McGrath* v. *Kristensen*, 340 U.S. 162, 167; *Mitchell* v. *Maurer*, 293 U.S. 237, 244; *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 359. See also, *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 36 U.S. Law Week 4157 (S. Ct. January 29, 1968), where the Court of Appeals for the Third Circuit *sua sponte* raised an indispensable party point, and therefore a jurisdictional defect, and where this Court reversed, not because the Court of Appeals should not have raised the question, but because it decided it erroneously. Respondents' reliance (br. pp. 32-33) on *C.I.O.* v. *McAdory*, 325 U.S. 472, 477, is misplaced. *McAdory* presented a question of conflict of a state statute with the National Labor Relations Act. A conflict question presupposes the power of a State to act, but requires that it act compatibly with federal standards (*Nash* v. *Florida Industrial Commission*, No. 48, October Term, 1967, December 5, 1967), unlike a preemption question, which if well-taken deprives the State of any power to act, whether it would act harmoniously or inconsistently with federal standards.

examined the jurisdiction of a court to enjoin action of the National Labor Relations Board in a representation proceeding although "no challenge was made by the parties" to judicial intercession. *McCulloch* v. *Sociedad Nacional De Marineros De Honduras*, 372 U.S. 10, 16. Accordingly, as preemption goes to the subject matter jurisdiction of the state court, there is on any hypothesis no tenable basis for barring review of that question here.[14]

4. The reason for reaching the preemption question is emphasized by respondents' virtual confession that the injunction could not survive were the power to issue it examined under preemption standards. For, while urging that the picketing is not arguably prohibited by the National Labor Relations Act, respondents are eloquently silent upon the essential companion inquiry into whether the picketing is arguably protected. They do not treat at all with the protected branch of the conduct, and of course preemption independently applies whether the conduct which a State seeks to take in hand is either arguably protected or arguably prohibited. Indeed, since respondents do not even suggest that the picketing is not arguably protected, there is

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[14] As the Wisconsin Supreme Court has held, in rejecting the claim that the issue of federal preemption of state prohibition of peaceful picketing within a shopping center could not be considered because not raised below, "Federal pre-emption deprives the state courts of subject matter jurisdiction. The question of whether the circuit court has subject matter jurisdiction to determine a controversy may be raised at any time, including for the first time on appeal . . . . Thus, it is permissible for the appellants to raise the issue of federal pre-emption for the first time in this court." *Moreland Corp.* v. *Retail Store Employees Union Local No. 444*, 16 Wis. 2d 499, 114 N.W. 2d 876, 878.

patently present here "the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." *Hanna Mining Co.* v. *M.E.B.A.*, 382 U.S. 181, 193.

Furthermore, respondents' claim that the picketing is not arguably prohibited is curious in view of the fact that one ground on which the Court of Common Pleas, but not the court below (R. 106), supported the issuance of the injunction was that the "picketing in this case is being conducted . . . for an unlawful purpose, that is, it . . . is designed, at least in part, to pressure Weis Markets, Inc. to compel its employees to join a union" (R. 99). This conclusion, to say the least, spells out an arguable violation of the National Labor Relations Act, and consequently places adjudication of the controversy within the exclusive power of the National Labor Relations Board. *Local No. 438 Construction Union* v. *Curry*, 371 U.S. 542. It is, therefore, more than a little difficult to urge that the picketing at issue in this case is not even arguably prohibited when one judge on this very record has concluded that its purpose was to coerce union membership.

The activity in this case is accordingly within the heartland of the NLRB's regulatory reach. The purpose of preemption is to avert the danger of state interference with national policy. Hence, "this is particularly a case in which 'we should be astute to avoid hindrances in the way of taking' up . . . [the

preemption] question." *Liner* v. *Jafco,* 375 U.S. 301, 306.

Respectfully submitted,

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March 1968.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, ET AL., *Petitioners,*

v.

LOGAN VALLEY PLAZA, INC. AND WEIS MARKETS, INC., *Respondents.*

On Writ of Certiorari to the Supreme Court of Pennsylvania

SUPPLEMENTAL BRIEF FOR PETITIONERS

In accordance with Rule 41(5) of the Rules of the Court, petitioners submit this supplemental brief to present to the Court the decision of the Court of Appeals for the Second Circuit in *Ronald G. Wolin* v. *Port of New York Authority*, No. 31,715, decided March 1, 1968, which is relevant to petitioners' First Amendment claim in this case, and which is reprinted as an appendix to this brief for the convenience of the Court.

Respectfully submitted,

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March 1968.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 251—September Term, 1967.

(Argued January 8, 1968 Decided March 1, 1968.)

Docket No. 31715

RONALD G. WOLIN, individually and on behalf of VETERANS AND RESERVISTS TO END THE WAR IN VIETNAM and the FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE,

Plaintiff-Appellee-Cross-Appellant,

—against—

PORT OF NEW YORK AUTHORITY, ALBERT RUBBERT, Manager of the PORT AUTHORITY BUS TERMINAL, CAPTAIN ROBERT FRIEND, Commanding Officer of Port Authority Terminal Police, LIEUTENANT JAMES PETTIS, LIEUTENANT FRED RACKOWSKI, LIEUTENANT HUGO SERRATI, LIEUTENANT ANTHONY UNETICH and LIEUTENANT GEORGE GAULRAPP, Officers of the Port Authority Terminal Police,

Defendants-Appellants.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Walter R.

Mansfield, *J.*, granting in part plaintiff's motion for summary judgment. Order affirmed as modified.

BRADLEY R. BREWER, New York, N. Y. (Eugene G. Eisner, David Fitzpatrick, Henry di Suvero, New York Civil Liberties Union, on the brief), *for Plaintiff-Appellee-Cross-Appellant.*

PATRICK J. FALVEY, New York, N. Y. (Sidney Goldstein, Arthur M. Schneider, on the brief), *for Defendants-Appellants.*

KAUFMAN, *Circuit Judge*:

Ronald Wolin and the organizations he represents[1] have brought before this court questions that are significant and perplexing. We set them forth seriatim. May the Port of New York Authority[2] bar the use of its Terminal to all exercise of First Amendment rights? Are the peaceful activities proposed by the plaintiff, including distribution of leaflets, carrying placards, setting up card tables and conducting discussions with passers-by entitled to substantial protection under the First and Fourteenth Amendments? Are the plaintiff and his associates, who have

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1 The plaintiff Ronald Wolin sues individually and on behalf of two organizations opposed to United States policy in Vietnam. The organizations are the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War in Vietnam.

2 Defendants are the Port of New York Authority, Albert Rubbert, the Manager of the Port Authority Bus Terminal, Captain Robert Friend, Commanding Officer of the Port Authority Police, and Lieutenants James Pettis, Fred Rackowski, Hugo Serrati, Anthony Unetich and George Gaulrapp, Officers of the Port Authority Terminal Police. We shall refer to the defendants collectively as the "Port Authority," and to the building as the "Terminal."

promised to withdraw and discontinue these activities in the event of a disturbance, entitled to official protection against disturbances provoked by a hostile audience? These questions have been tactfully and carefully framed for us by the parties who appear here in confrontation after a constitutional *pas-de-deux*. Some fifteen months have passed since the plaintiff first sought to exercise his asserted right of protest.

We hold that the Port Authority may not abridge by absolute prohibition the right of political expression. The peaceful activities proposed by Wolin are protected against denial by the Port Authority, and accordingly, they may be restricted only by regulations narrowly drawn to serve legitimate interests of the general public who use the Terminal. We therefore affirm the judgment of the District Court, with modifications as set forth.

I.

During the latter part of 1966, Ronald Wolin and others associated with the Fifth Avenue Vietnam Peace Parade Committee and the Veterans and Reservists to End the War in Vietnam assembled outside an entrance to the Bus Terminal building operated by the Port of New York Authority at Eighth Avenue and 40th Street, Manhattan. They came there for the purpose of distributing literature to persons on the sidewalk and occasionally engaging in conversation with persons in the area. These activities, designed to publicize the views of the group concerning the Vietnam war, were at all times conducted in a peaceful and orderly manner.

The Port of New York Authority is a public corporation created in 1921 by agreement between the States of New York and New Jersey. McKinney's Unconsolidated

Laws of N. Y., §6401, §6404. The Bus Terminal building operated by the Port Authority occupies a full city block in Manhattan. Thousands of persons use the terminal facilities, entering from the subway or through six outside entrances, using the fifty foot wide main concourse and four other levels to get to and from buses, subways, city streets, shops and other concessions. In 1966 the average number of persons passing through the building each day approximated 205,000 and on December 24, 1966 some 325,000 people used the facility. The Terminal contains, in addition to the open concourse areas and waiting rooms, bus line ticket counters, newsstands, restaurants, snack bars, a bakery, a drugstore, a bar, a bowling alley, a bank, gift shops and various other shops and concessions which are open to the general public. The defendant Albert Rubbert is the manager of the Terminal with general supervisory responsibility for its operations. The Port Authority maintains its own police force of 38 men who are charged with maintaining order and patrolling the terminal; the defendant Captain Robert Friend is the head of this contingent of the Port Authority police, and the other named defendants are officers assigned to duty in the terminal.[3]

In early November, 1966 Wolin and his group decided to take their protest inside the terminal where they might find in greater numbers than on the sidewalks their particular audience, traveling servicemen. Accordingly, with five others, Wolin entered the terminal on the evening of November 6 and distributed leaflets in the area near gates 108-115 on the upper bus level for approximately 80 minutes. Although it is agreed that their conduct was peaceful

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3 The Terminal police are expressly provided with the powers of "peace officers." N. Y. Code of Crim. Proc. §154.

and did not cause any interference with the traffic in the Terminal, they were nevertheless approached by Lieutenant Serrati who requested their names. The six individuals refused to comply with Serrati's request and after some discussion, he threatened to arrest them if they refused to disband and leave the building. During this discussion, the police officer stated that the protesters were on "private" property, and demanded to know if they were there for the purpose of buying a ticket or travel by bus. The plaintiff and his associates replied that they were exercising their right of free speech by distributing the leaflets.

In this brief confrontation the pattern for the future encounters was set. On November 13, plaintiff entered the building with two others, and distributed handbills for about thirty minutes before they were asked to leave by Lieutenant Gaulrapp. Next, on November 16, 1966, plaintiff wrote to defendant Rubbert, the Manager of the Terminal, to request permission "to conduct free speech activities in the public areas of the Port Authority Bus Terminal"; in particular to distribute political handbills, to carry placards, to use card tables for the distribution of literature, to engage in discussions with others. Wolin proposed to conduct these activities every Sunday evening, and, in addition, on Wednesday evening, November 23, Friday evening, December 23 between 6 p.m. and 11 p.m. and Saturday, December 24, 1966 between 11 a.m. and 11 p.m. The nature of the proposed protest activity was evident from the letter:

> The purpose of the activities covered by this request will be to communicate our views concerning the Vietnam war to traveling servicemen and to members of

the public within the terminal and to persuade them to join our cause.

We do not intend to interfere in any significant or substantial way with the operation and use of the terminal for the convenience of bus passengers or other persons who may be passing through or waiting in the building. . . .

We intend to conduct our activities inside the terminal because this is the most effective—and perhaps the only effective—way to achieve our purpose. . . .

We do not intend to be in any way riotous, tumultuous, violent, threatening, intimidating, abusive, obscene, or insulting; nor do we intend to incite, provoke, or encourage any such behavior by anyone else. . . . If a situation should arise which the Terminal police cannot control, we shall temporarily cease our activities until such situation no longer exists. We intend to obey any police order reasonably designed to prevent serious disorder or blockage of pedestrian traffic.

Action leading to this lawsuit soon followed. On November 17, 1966, Rubbert denied the plaintiff's request, relying on the regulations governing use of the Terminal facility and the consistent policy of the Port Authority to deny permission to groups interested in conducting demonstrations or distributing leaflets in the building.[4] The Manager

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4 The Manager of the Terminal based his refusal of Wolin's request on the following rules and regulations promulgated pursuant to §6419, McKinney's Unconsolidated Laws:

"2. The Superintendent of the Terminal shall have authority to deny the use of the Terminal to any individual violating Port Authority Rules and Regulations, or laws, ordinances or regulations of . . . the State of New York or the City of New York.

"5. No person shall carry on any commercial or other activity at the Terminal without permission.

(*footnote continued on next page*)

threatened arrest if the plaintiff persisted in his desire to protest within the Terminal.

Wolin then brought this action in the Southern District, seeking a declaratory judgment that he be permitted to distribute leaflets and to conduct other enumerated activities in the main concourse and passageways of the Terminal. Plaintiff also asked that the defendants be enjoined from restraining such activities, or arresting those persons exercising their rights of protest, or requiring him to obtain permission to engage in these activities, or in any way discouraging the public from accepting the leaflets, or harassing and interfering with the peaceful and orderly conduct of the plaintiff. Jurisdiction was based on 42 U. S. C. §1983, 28 U. S. C. §§1331, 1343 and 2201 and the First and Fourteenth Amendments to the United States Constitution.

"8. No person shall post, distribute or display signs, advertisements, circulars or printed or written matter within the Terminal without permission."

In addition, without defining what constitutes a "nuisance," Regulation 12 prohibits any person from doing any act or thing which shall result in a creation or maintenance of a "nuisance" at the Terminal. In practice the decision to grant or deny a request in any particular case has been delegated by the Port Authority to Rubbert, the Manager of the Terminal, and it has been stipulated that his consistent policy is to deny all requests made by individuals or groups seeking access to the Terminal for the purpose of distributing leaflets or engaging in other protest activities.

It is not disputed that the Port Authority has in the past granted permission to use the facility for other purposes. Charitable contributions have been solicited, glee clubs have sung in the Terminal, and broadcast their performance over the loud speaker system. Moreover, on occasion and for a fee, the Terminal has permitted automobile manufacturers to display their products and to distribute promotional literature in the concourse areas. The Port Authority has indicated that those who wished to communicate political views were denied access because —unlike these other groups—their activity is provocative and controversial.

Eventually, both parties moved for summary judgment. Judge Mansfield, in a carefully reasoned opinion,[5] granted the plaintiff's motion to the extent of finding that the Terminal area was dedicated to public use as a thoroughfare and that it was therefore an appropriate place for the exercise of rights protected by the First Amendment. He decided that plaintiff had a right to distribute the leaflets and this right could only be restricted under reasonable, limited, and clear regulations promulgated by the Authority. Accordingly, the court declared four sections of the Rules and Regulations unconstitutional and enjoined defendants from interfering with the plaintiff's right to distribute leaflets in a manner that would not unduly obstruct traffic in the terminal. He directed the Port Authority to promulgate new regulations that met standards of uniformity and specificity, to govern distribution of leaflets as well as the other methods of communication proposed by the plaintiff. The Port Authority appealed, challenging this order in its entirety and arguing that the terminal is an inappropriate place for political expression. The defendants contend that the absolute proscription of such activity embodied in present policy is proper and lawful. In response, the plaintiff has cross-appealed contending first, that the order failed to include a direction that defendants protect plaintiff in the exercise of his rights of protest against harassment from others; second, that the order should include similar protection pending the promulgation of regulations for activities other than the distribution of leaflets but no less protected by the Constitution; third, that the court should have declared the plaintiff's rights irreparably violated by the defendants' past conduct; fourth, that it was error to declare

5 268 F. Supp. 855 (S. D. N. Y. 1967).

the regulations void only insofar as they involved censorship of protected expression; fifth, that any requirement of prior permission for the activities involved here should be declared invalid. In part the plaintiff's claims are concerned with the phrasing of the terms of the order; in part, as will appear, the cross-appeal points up important issues that were unresolved by the District Court, and which require some modification of the order.

II.

The Port Authority in applying its Rules and Regulations has consistently denied access to its facility to those seeking to use the premises as a forum for expression. The ultimate question before us is whether these policies and regulations "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). To make this determination we must first decide whether the terminal so resembles a public thoroughfare to make it an appropriate place for the exercise of First Amendment rights. Once the threshold to First Amendment analysis is crossed, we must determine whether the various methods proposed by the plaintiff to communicate his views are entitled to substantial protection under the First and Fourteenth Amendments so that plenary prohibition is impermissible and any regulation should be subjected to the scrutiny and judged by standards of precision applied to restrictions of such important rights.

We first inquire if the Terminal is a place appropriate for political expression. Judge Mansfield saw the determination as between places dedicated to public use where fundamental rights must be recognized and protected and places

essentially private where the owner's rights of property and privacy are superior. With the issues thus posed, he properly concluded, that the Terminal is dedicated to the public use, to no less a degree than the streets of a company owned town, *Marsh* v. *Alabama*, 326 U. S. 501 (1956), or the grounds of a World's Fair, *Farmer* v. *Moses*, 232 F. Supp. 154 (S. D. N. Y. 1964), or the parking lot of a shopping center, *Schwartz-Torrance Investment Corp.* v. owned town, *Marsh* v. *Alabama*, 326 U. S. 501 (1946), or 394 F. 2d 921 (1964), cert. denied, 380 U. S. 906 (1965). He emphasized, and we agree, that the placement of title to property is not dispositive for "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U. S. at 506. Judge Mansfield quoted at length the words of Justice Roberts in *Hague* v. *CIO*, 307 U. S. 496, 515, 516 (1939) which are the touchstone for courts charged with accommodating rights of expression with other interests at play in the public forum:

> Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to

> the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

In the sense that the general public is afforded ready access to the facilities inside the Terminal, and that the Terminal was created pursuant to compact between two States and administered according to statutory requirements necessary to its function as a facility devoted to public transportation, it cannot be disputed that the Terminal is a public instrumentality—a public place subject to constraints imposed by the Constitution. This determination would conclude our inquiry if the problem involved solely a discrimination in violation of the Fourteenth Amendment and we were asked to determine if the power of the state was so intertwined with the Terminal activity that the Constitution forbade such action. *Reitman* v. *Mulkey*, 387 U. S. 375 (1967); *Evans* v. *Newton*, 382 U. S. 296 (1966); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4 Cir. 1963).

However, where the issue involves the exercise of First Amendment rights in a place clearly available to the general public, the inquiry must go further: does the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views on issues of political and social significance. The factors to be considered are essentially the same, be the forum selected for expression a street, park, shopping center, bus terminal, or office plaza.[6]

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6 See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1; Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

The Port Authority argues that the Terminal is an inappropriate site for such activity because the interior of a building is not traditionally a place for exercise of First Amendment rights. Moreover, it is urged that the Terminal is unrelated to the subject under discussion and that the purposes for which the building was constructed do not include plaintiff's suggested activity. We disagree with these views because they evidence too little regard for the vagaries of effective communication, and for the versatility of the First Amendment's proscription. As we have already indicated, the character and function of the Terminal, makes clear that it is a thoroughfare used by thousands of people each day. It is one of the busiest passageways in the country, with persons hurrying to and from subways, buses, shops, theaters, and other streets. In design and physical appearance, the main concourse resembles a street. The fifty foot walk is lined with stores and concessionaires, crowded at some hours and less dense at others. Unlike an office building corridor or an apartment house hallway, *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, cert. denied 335 U. S. 886 (1948), the people are not simply using the connecting passageway to reach a place where they engage in different, more pacific or reflective activities. They are in the Terminal for the principal purpose of moving to and from other means of transportation—and the space is designed for precisely the purpose of transit. With the scope of operations so vast, the enclosure is desirable and indeed necessary if the congestion and confusion that would attend if all waited for buses on the street are to be avoided. In other times or better climes travelers have waited by the roadside or under some shelter for the oncoming vehicle. But here, the buses drive into the building and the passengers meet them there. The Terminal, with its many ad-

juncts, becomes something of a small city—but built indoors, with its "streets" in effect set atop one another, and vehicles operating under, above, and to the side, not unlike some futuristic design for urban living.

Thus, we cannot accept the argument that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression. The privacy and solitude of residents may require that apartment house hallways be insulated from the excitement of volatile exhortations, or the quiet dignity of judicial administration may dictate that courthouse passages be kept free of demonstration.[7] But that is a result based on wisdom and experience because the abrasions caused by any protected speech would too greatly interfere with other interests—and not simply because there is a covering on the building. Indeed, the public forum is surely as traditionally a covered meeting hall as a sunlit arena. *Thomas* v. *Collins*, 373 U. S. 516 (1945); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed[8] is attended with noisy crowds and

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7. *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, cert. denied 335 U. S. 886 (1948). *State* v. *McNair*, 178 Neb. 763, 135 N. E. 2d 463 (1965).

8 Under McKinney's Unconsolidated Laws §6701, a bus terminal exists ". . . for the accommodation of omnibuses and other motor vehicles operated by carriers engaged in the transportation of passengers, or for the loading, unloading, interchange or transfer of such passengers or their baggage, or otherwise for the accommodation, use or convenience of such passengers or such carriers or their employees . . ." It cannot be doubted that the public is afforded free access to the facilities for this purpose, and that the activity is necessarily accompanied by the noise and unrest of hurrying crowds. Further, it is clear that the character and function of the place chosen for protest will affect the limits of tolerable disruption from protest. In *Edwards* v. *South Carolina*, 372 U. S. 229, 233 (1963) the Supreme Court granted protection to "boisterous," "loud," and "flamboyant" conduct in the form of cheering and singing in a statehouse driveway during the day. See also

vehicles, some unrest and less than perfect order. Like a covered marketplace area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum. The admission of charity solicitors, glee clubs, and automobile exhibitions without untoward incident evidences the ease with which the Terminal accommodates different forms of communication. To deny access to political communication seems an anomalous inversion of our fundamental values. Cf. *Wirta* v. *Alameda Contra Costa Transit District,* 36 U. S. L. W. 2375 (Calif. Sup. Ct. Dec. 12, 1967).

The defendant argues that the inappropriateness of the place is demonstrated by the fact that Wolin's message bears no special relation to the operations of the Terminal. The propriety of a place for use as a public forum does turn on the relevance of the premises to the protest, but this relation may be found in two ways. In some situations the place represents the object of protest, the seat of authority against which the protest is directed. See *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Adderley* v. *Florida,* 385 U. S. 39 (1966); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). In other situations, the place is where the relevant audience may be found. Here, the plaintiff is attempting

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Cox v. *Louisiana,* 379 U. S. 536, 546-48 (1965). Similar activity would not receive the same treatment if it was conducted near a hospital, in a public library, an apartment hallway, or a city council chamber, places where "order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation." See *Brown* v. *Louisiana,* 383 U. S. 131, 157 (1966) (Black, *J.* dissenting) (see also 383 U. S. at 139 (dictum)); *Watchtower Bible & T. Soc.* v. *Metropolitan Life Ins. Co., supra; State* v. *McNair,* 178 Neb. 763, 135 N. W. 2d 463 (1965) (singing and marching in city council chamber). See generally, Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773, 1774-75 (1967).

to communicate his antiwar protest to the general public and to a special audience—servicemen traveling to and from their bases, particularly buses arriving from Fort Dix. The public is there, more than 200,000 persons a day, and it is likely that the concourse areas are more appropriate for the proposed activity than a narrow sidewalk. And servicemen on leave are in the Terminal also in great numbers.

If the Terminal is a proper place for the exercise of First Amendment rights under appropriate regulations, a denial of these rights cannot be based on the statutory authority granted the Terminal officials to bar miscreants and disorderly persons from the facility. N. Y., Penal Law, §150.[9] As the able trial judge recognized, "the purpose of such disorderly conduct statutes is to prevent terminals from being infested by those 'who have no occasion to be there,' such as congregations of degenerates or nondescript characters who pose a danger to the public. . . . No such threat is posed here." 268 F. Supp. at 861; see *People* v. *Bell*, 306 N. Y. 110 (1953). The plaintiff is not a "nondescript character" who is a danger to the public. Instead, he seeks to exercise an historic right of freemen, to participate in his society by attempting to persuade others of his position on issues of the utmost importance.

Provocative and controversial the discussion may be, but in the excitement generated by political controversy our preconceptions and prejudices are tested. The framers of the Constitution opted for the disharmony of controversy be-

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9 "§150. Peddling, unauthorized soliciting of business or trade, begging or loitering on air and bus terminal property.

* * * * *

"2. Any person who loiters about any toilet, area, station, station platform, waiting room or any other appurtenance of an air or bus terminal, or who is found sleeping therein or thereon and who is unable to give satisfactory explanation of his presence is guilty of an offense."

cause they believed that in that unrest lay the best prospect of an ordered society.[10]

Others may quarrel with Wolin's choice of forum and vigorously dispute his message, but we believe the Port Authority may not abridge his right to choose this place any more than they can control his choice of message. We hold the Constitution precludes the Port Authority from enforcing a plenary prohibition of speech within the Terminal.[11]

III.

We must now consider whether Wolin's proposed activities including distribution of leaflets, carrying placards, setting up card tables, and engaging in conversation with others using the Terminal are entitled to substantial protection under the First and Fourteenth Amendments. Judge Mansfield decided the question with respect to the distribution of leaflets; he carefully considered and countered the assorted reasons offered by defendants in justification of an absolute bar on such activity. Thus, a uniform and absolute prohibition could not be defended on the ground that the action would obstruct traffic since there was no contention that every leaflet distribution would be obstructive regardless of time or location. The prospect of littering from the distribution of political circulars within the facility, while acknowledged, is con-

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10 "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949), quoted in *Cox* v. *Louisiana*, 379 U. S. at 551-52.

11 In the rare case where the speech itself amounts to illegal activity, as where the speaker incites desertion from the armed forces or counsels insubordination by a serviceman. see 18 U. S. C. §§1381, 2387, the speaker is of course subject to arrest on warrant or probable cause and to prosecution in the normal course.

stitutionally insufficient to support a flat proscription. *Schneider* v. *State*, 308 U. S. 147 (1939). Similarly, the availability of some alternative forum, and the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal, are not material where the issue involves a blanket and wholesale ban. The potential provocation caused by heated debate is not a valid reason to preclude discussion. Judge Mansfield stated it well: "The right of free public expression on political issues is too dearly prized to be curtailed without equally important public cause. Such suppression would be the first step toward ultimate stagnation of essential debate." 268 F. Supp. at 863.

We agree with the District Court that a flat prohibition on distribution of leaflets in a place appropriate for political expression cannot stand. The Supreme Court has clearly recognized that "pamphlets (have) become historic weapons in the defense of liberty," and that "public convenience in respect to cleanliness of the streets" does not justify such drastic interference with precious rights of communication. *Schneider* v. *State*, 308 U. S. 147, 160-61 (1939); see also *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Talley* v. *California*, 362 U. S. 60 (1960); Kalven, The Concept of the Public Forum, 1965 Sup. Ct. Rev. 1, 15-21; Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 926-28 (1963); *Niemotko* v. *Maryland*, 340 U. S. 268, 273-89 (1951) (separate opinion of Frankfurter, J.). It seems to us that these cases clearly establish that non-commercial leaflet distribution is an essential right that cannot be barred except for especially good reasons, and that the burden of street cleaning is not good enough. We believe it beyond dispute that the congestion and controversy that may attend the activity in the Terminal, while pertinent to the enactment of rules and

regulations to govern the activity, cannot be invoked to support a flat prohibition.

Although Judge Mansfield directed the defendant to incorporate the other activities proposed by the plaintiff in the new regulations he ordered the Port Authority to issue, the Judge does not seem to have determined if those activities were protected under the First Amendment. His hesitancy is understandable for we might look in vain through recent Supreme Court cases involving public demonstrations for some resolution of the problem whether picketing, marches, placards and similar modes of communication are afforded comparable respect under the Constitution.[12] But we are obliged to resolve the issues sharply presented to us by the record.

We believe each proposed activity must be afforded some measure of protection. Whether we speak of placards or conversation or tables laden with literature[13] we deal with forms of communication developed to express the plaintiff's views to the particular audience. The methods adopted may be unsophisticated or crude and even ineffec-

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12 The Court seems to remain split on the critical issue whether public demonstrations are entitled to substantial protection. Compare opinions by Justice Black in *Adderley* v. *Florida*, 385 U. S. 39 (1966) and *Brown* v. *Louisiana*, 383 U. S. 131, 151 (1966) (dissenting) with opinions by Justice Fortas in *Brown* v. *Louisiana*, 383 U. S. 131 (1966) and Justice Douglas in *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966). See also Justice White's opinion in *Brown* v. *Louisiana*, 383 U. S. 131, 150 (1966) and Justice Stewart's opinion in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963). See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

13 The New York Court of Appeals has recently decided that the use of card tables on a street for the distribution of political literature is protected against plenary denial. *People* v. *Katz*, ——. N. Y. 2d —— (Dec. 28, 1967). The potential of card tables for obstruction of traffic is sufficiently great that it may be reasonable to bar their use from the Terminal even at times when other techniques of communication are permissible. We leave that decision in the first instance to the appropriate officials who draw the regulations.

tual when compared with other means, but they are no less robust and no less intended to air the speaker's views as effectively as his resources and energy permit.[14] The techniques involved here are peaceful and orderly; we deal with an attempt to communicate directly by forms that are classic in simplicity and worthy of emulation. Ronald Wolin does not present us with a program of coercion or defiance of laws of physical confrontation. He asks that he and his associates be permitted to stand with placards and converse with persons who accept their handbills; also, that they be allowed to set their display on tables rather than floors. In this context, such activity is the substance of the "free trade in ideas" no less than the soapbox orator, *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, *J.* dissenting). No less than the leaflet, the newspaper, or the oration it appeals "to the power of reason as applied through public discussion," *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, *J.* concurring).

We should in these times be mindful that to the extent we secure legitimate and orderly access to means of communication for all views, we create conditions in which there is no incentive to resort to more disruptive conduct. Ronald Wolin seeks protection through the channels of his government of rights accorded him by the Constitution and we, as the agency of that government charged with securing those rights, ought ensure that no unneeded delay encumber the exercise of such critical freedoms.

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14 Professor Meiklejohn put it this way: "What is essential is not that everyone shall speak, but that everything worth saying shall be said." A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 25-28 (1960); V. O. Key, Public Opinion and American Democracy 378-87 (1961); Barron. Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Ferry, Masscomm as Educator, 35 Am. Scholar 293 (1966).

IV.

We are brought then to consideration of the regulations under which the plaintiff was denied access to the Terminal. Judge Mansfield found, and we agree, that the present regulations are an excessive delegation of unfettered discretion placed in the power of the Terminal Manager, defendant Rubbert, and that therefore they are unconstitutional. *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Lovell* v. *City of Griffin,* 303 U. S. 444 (1938). The effect of the present regulations is to empower a single official to refuse access on his mere opinion that a denial will prevent inconvenience and disorder. By such devices official authority can become "an instrument of arbitrary suppression of opinion on public questions." *Cox* v. *New Hampshire,* 312 U. S. 569, 577 (1941).

As we have indicated, the District Court directed the defendant to promulgate new regulations carefully drawn to control the conduct of plaintiff and similar groups within the building. No one can question the legitimate public interest in maintaining a free flow of traffic in the Terminal, in avoiding excessive disruption of normal activities there, in ensuring the convenience and movement of passengers and vehicles. To meet this need, the relevant authority, whether municipal or otherwise, may prescribe "rules of order" for the use of the premises. The character of the place, including the number of persons passing through at different times and the enclosed design of the forum, will affect the degree of restriction tolerable under the Constitution. We need not—indeed it would be inadvisable for us to do so without more adequate information —prescribe in detail the standards or terms of such rules. We believe the drafting of regulations is, in the first instance, properly the function of the responsible officials.

But, some guidelines are in order. In accommodating the interest of protesters and general public, the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised. Certainly, the officials in drawing these rules will be mindful that the plaintiff has a constitutionally cognizable interest in reaching a broad audience, that he is entitled to do so within limits tolerable in light of the usual activities in the Terminal.[15]

In drawing appropriate regulations the Terminal officials may consider whether the circumstances justify a requirement that groups like those represented by the plaintiff should give advance notice to the Terminal officials. Such notice requirements must be examined with special care in view of the tendency to abuse. See *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); Freund, Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533 (1951). Whether the circumstances in this case support such a requirement properly rests in the first instance with the officials who will draft the regulations, and therefore, we intimate no view on this question.

In the exercise of his rights under fair and reasonable regulations, the plaintiff is also entitled to protection by the Terminal police.[16] *Hague* v. *CIO,* 307 U. S. 496 (1939);

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15 See, e.g., *Cottonreader* v. *Johnson,* 252 F. Supp. 492 (M. D. Ala. 1966); *Williams* v. *Wallace,* 240 F. Supp. 100 (M. D. Ala. 1965); *Farmer* v. *Moses,* 232 F. Supp. 154 (S. D. N. Y. 1964); *1621, Inc.* v. *Wilson,* 402 Pa. 94, 166 A. 2d 271 (1960); *Anora Amusement Corp.* v. *Doe,* 171 Misc. 279, 12 N. Y. S. 2d 400 (Sup. Ct. 1939). Note, Regulations of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

16 In *Wright* v. *Georgia,* 373 U. S. 284, 293 (1963) the Supreme Court said that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." See also *Brown* v. *Louisiana,* 383 U. S. 131, 133

Kelly v. *Page*, 335 F. 2d 114 (5 Cir. 1964); *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965). This protection should be included in the order issued by the court so that the officials will be on notice of their constitutional responsibility to protect those properly exercising rights of expression. In this way the district court will be discharging its responsibility to reconcile the interests at odds in the public forum.

One final observation. It is essential that these regulations be issued promptly. The plaintiff has waited many months for the protection of rights secured to him by the Constitution. These rights are as effectively stifled by delay as by suppression.

We therefore affirm the order as modified. The District Court is directed to retain jurisdiction and prescribe a time schedule for the promulgation and adoption of reasonable, non-discriminatory regulations of general application governing the activities proposed by the plaintiff. Pending the adoption and approval of those regulations, the plaintiff and those represented by him will be permitted to engage in such activities in a manner consistent with the standards set forth above.

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n. 1 (1966). Of course the law enforcement officers must be permitted to exercise judgment in maintaining order within the Terminal. We hold simply that the order acknowledge the established proposition that the speaker must be protected from undue harassment by others.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, v. Logan Valley Plaza, Inc., et al. } On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Marshall delivered the opinion of the Court.

This case presents the question whether peaceful picketing of a business enterprise located within a shopping center can be enjoined on the ground that it constitutes an unconsented invasion of the property rights of the owners of the land on which the center is situated. We granted certiorari to consider petitioners' contentions that the decisions of the state courts enjoining their picketing as a trespass are violative of their rights under the First and Fourteenth Amendments of the United States Constitution. 389 U. S. 911 (1967).[1] We reverse.

Logan Valley Plaza, Inc. (Logan), one of the two respondents herein, owns a large, newly developed shopping center complex, known as the Logan Valley Mall, located near the City of Altoona, Pennsylvania. The shopping center is situated at the intersection of Plank

[1] Petitioners also contend (1) that the state courts were without jurisdiction in this case because the controversy involves issues that are within the exclusive jurisdiction of the National Labor Relations Board, see *Meat Cutters Local 427* v. *Fairlawn Meats, Inc.*, 353 U. S. 20 (1957), and (2) that the picketing herein was protected as a "concerted activity for . . . mutual aid or protection" by § 7 of the National Labor Relations Act, 29 U. S. C. § 147. Because of our disposition of the case, we do not reach either contention.

Road, which is on the east of the center, and Good's Lane, which is to the south. Plank Road, also known as U. S. Route 220, is a heavily traveled highway along which traffic moves at a fairly high rate of speed. There are five entrance roads into the center, three from Plank Road and two from Good's Lane. Aside from these five entrances, the shopping center is totally separated from the adjoining roads by earthen berms. The berms are 15 feet wide along Good's Lane and 12 feet wide along Plank Road.

At the time of the events in this case, Logan Valley Mall was occupied by two businesses, Weis Markets, Inc. (Weis), the other respondent herein, and Sears, Roebuck and Co. (Sears), although other enterprises were then expected and have since moved into the center. Weis operates a supermarket and Sears operates both a department store and an automobile service center. The Weis property consists of the enclosed supermarket building, an open but covered porch along the front of the building, and an approximately five-foot wide parcel pickup zone that runs 30 to 40 feet along the porch. The porch functions as a sidewalk in front of the building and the pickup zone is used as a temporary parking place for the loading of purchases into customers' cars by Weis employees.

Between the Weis building and the highway berms are extensive macadam parking lots with parking spaces and driveways lined off thereon. These areas, to which Logan retains title, provide common parking facilities for all the businesses in the shopping center. The distance across the parking lots to the Weis store from the entrances on Good's Lane is approximately 350 feet and from the entrances on Plank Road approximately 400 to 500 feet. The entrance on Plank Road furthest from the Weis property is the main entrance to the shopping center as a whole and is regularly used by customers of

Weis. The entrance on Plank Road nearest to Weis is almost exclusively used by patrons of the Sears automobile service station into which it leads directly.

On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees. A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot. On December 17, 1965, members of Amalgamated Food Employees Union, Local 590 began picketing Weis. They carried signs stating that the Weis market was nonunion and that its employees were not "receiving union wages or other benefits." The pickets did not include any employees of Weis, but rather were all employees of competitors of Weis. The picketing continued until December 27, during which time the number of picketers varied between four and 13 and averaged around six. The picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto. Although some congestion of the parcel pickup area occurred, such congestion was sporadic and infrequent.[2] The picketing was peaceful at all times and unaccompanied by either threats or violence.

On December 27, Weis and Logan instituted an action in equity in the Court of Common Pleas of Blair County, and that court immediately issued an *ex parte* order enjoining petitioners[3] from, *inter alia*, "picketing and trespassing upon . . . the [Weis] storeroom, porch and parcel pick-up area . . . [and] the [Logan] parking area and

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[2] Such congestion as there may have been was regulated by portions of the order not here challenged. See n. 4, *infra*.

[3] In addition to Local 590, the petitioners herein are various members and officials of the local who were engaged in the picketing in one way or another.

entrances and exits leading to said parking area."[4] The effect of this order was to require that all picketing be carried on along the berms beside the public roads outside the shopping center. Picketing continued along the berms and, in addition, handbills asking the public not to patronize Weis because it was nonunion were distributed, while petitioners contested the validity of the *ex parte* injunction. After an evidentiary hearing, which resulted in the establishment of the facts set forth above, the Court of Common Pleas continued indefinitely its original *ex parte* injunction without modification.[5]

That court explicitly rejected petitioners' claim under the First Amendment that they were entitled to picket within the confines of the shopping center, and their contention that the suit was within the primary jurisdiction of the NLRB. The trial judge held that the injunction was justified both in order to protect respondents' property rights and because the picketing was unlawfully

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[4] The court also enjoined petitioners from blocking access by anyone to respondents' premises, making any threats or using any violence against customers, employees, and suppliers of Weis, and physically interfering with the performance by Weis employees of their duties. Petitioners make no challenge to these parts of the order and it appears conceded that there has been no subsequent picketing by petitioners in violation of these provisions. A portion of the order also directs that no more than "—— pickets" be used at any one time, but no number has ever been inserted into the blank space and thus no limitation appears to have ever been imposed.

[5] We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forthcoming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. Compare *Construction Laborers' Local 438* v. *Curry*, 371 U. S. 542 (1963).

aimed at coercing Weis to compel its employees to join a union. On appeal the Pennsylvania Supreme Court, with three Justices dissenting, affirmed the issuance of the injunction on the sole ground that petitioners' conduct constituted a trespass on respondents' property.[6]

We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *AFL* v. *Swing*, 312 U. S. 321 (1941); *Bakery Drivers Local 802* v. *Wohl*, 315 U. S. 769 (1942); *Teamsters Local 795* v. *Newell*, 356 U. S. 341 (1958). To be sure, this Court has noted that picketing involves elements of both speech and conduct, *i. e.*, patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See, *e. g.*, *Hughes* v. *Superior Court*, 339 U. S. 460 (1950); *International Bhd. of Teamsters* v. *Vogt*, 354 U. S. 284 (1957); *Cox* v. *Louisiana*, 379 U. S. 559 (1964); *Cameron* v. *Johnson*, *ante*. Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.

The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end, *e. g.*, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949); *Building Service Employees Local 262* v. *Gazzam*,

[6] Petitioners did not argue their pre-emption contentions in their brief before the Pennsylvania Supreme Court and, accordingly, that court does not appear to have passed on them.

339 U. S. 532 (1950); *Plumbers Local 10* v. *Graham*, 345 U. S. 192 (1953), or to have been directed to coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice, *e. g.*, *Carpenters Local 213* v. *Ritter's Cafe*, 315 U. S. 722 (1942) (secondary boycott); *Teamsters Local 309* v. *Hanke*, 339 U. S. 470 (1950) (self-employer union shop). Compare *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U. S. 675 (1951), and *International Bhd. of Electrical Workers* v. *NLRB*, 341 U. S. 694 (1951).

Those cases are not applicable here because they all turned on the purpose for which the picketing was carried on, not its location. In this case the Pennsylvania Supreme Court specifically disavowed reliance on the finding of unlawful purpose on which the trial court alternatively based its issuance of the injunction.[7] It did emphasize that the pickets were not employees of Weis and were discouraging the public from patronizing the Weis market. However, those facts could in no way provide a constitutionally permissible independent basis for the decision because this Court has previously specifically held that picketing of a business enterprise cannot be prohibited on the *sole* ground that it is conducted by persons not employees whose purpose is to discourage patronage of the business. *AFL* v. *Swing*, 312 U. S. 321 (1941). Compare *Bakery Drivers Local 802* v. *Wohl*, 315 U. S. 769 (1942). Rather, those factors merely supported the court's finding of a trespass by demonstrating that the picketing took place without the consent, and against the will, of respondents.

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[7] Needless to say, had the Pennsylvania Supreme Court relied on the purpose of the picketing and held it to be illegal, substantial questions of pre-emption under the federal labor laws would have been presented. Compare *Hotel Employees Local 255* v. *Sax Enterprises, Inc.*, 358 U. S. 270 (1959).

The case squarely presents, therefore, the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises. It is clear that if the shopping center premises were not privately owned but instead constituted the business area of a municipality, which they to a large extent resemble, petitioners could not be barred from exercising their First Amendment rights there on the sole ground that title to the property was in the municipality. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *CIO*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 412 (1943). The essence of those opinions is that streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.

The fact that *Lovell*, *Schneider*, and *Jamison* were concerned with handbilling rather than picketing is immaterial so far as the question is solely one of right of access for the purpose of expression of views. Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true. Obviously, a few persons walking slowly back and forth holding placards can be less obstructive of, for example, a public sidewalk

than numerous persons milling around handing out leaflets. That the manner in which handbilling, or picketing, is carried out may be regulated does not mean that either can be barred under all circumstances on publicly owned property simply by recourse to traditional concepts of property law concerning the incidents of ownership of real property.

This Court has also held, in *Marsh* v. *Alabama*, 326 U. S. 501 (1946), that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held. In *Marsh*, the appellant, a Jehovah's Witness, had undertaken to distribute religious literature on a sidewalk in the business district of Chickasaw, Alabama. Chickasaw, a so-called company town, was wholly owned by the Gulf Shipbuilding Corporation. "The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. . . . [T]he residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of 30 feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." 326 U. S., at 502–503.

The corporation had posted notices in the stores stating that the premises were private property and that no solicitation of any kind without written permission would be permitted. Appellant Marsh was told that she must have a permit to distribute her literature and that a permit would not be granted to her. When she declared that the company rule could not be utilized to prevent her from exercising her constitutional rights under the First Amendment, she was ordered to leave Chickasaw. She refused to do so and was arrested for violating Alabama's criminal trespass statute. In reversing her conviction under the statute, this Court held that the fact that the property from which appellant was sought to be ejected for exercising her First Amendment rights was owned by a private corporation rather than the State was an insufficient basis to justify the infringement on appellant's right to free expression occasioned thereby. Likewise the fact that appellant Marsh was herself not a resident of the town was not considered material.

The similarities between the business block in *Marsh* and the shopping center in the present case are striking. The perimeter of Logan Valley Mall is a little less than 1.1 miles. Inside the mall were situated, at the time of trial, two substantial commercial enterprises with numerous others soon to follow.[8] Immediately adjacent to the mall are two roads, one of which is a heavily traveled state highway and from both of which lead entrances directly into the mall. Adjoining the buildings in the middle of the mall are sidewalks for the use of pedestrians going to and from their cars and from building to building. In the parking areas, roadways for the use of vehicular traffic entering and leaving the

[8] We are informed that, in addition to Weis and Sears, 15 other commercial establishments are presently situated in the shopping center.

mall are clearly marked out. The general public has unrestricted access to the mall property. The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in *Marsh*.

It is true that, unlike the corporation in *Marsh*, the respondents here do not own the surrounding residential property and do not provide municipal services therefor. Presumably, petitioners are free to canvass the neighborhood with their message about the nonunion status of Weis Market, just as they have been permitted by the state courts to picket on the berms outside the mall. Thus, unlike the situation in *Marsh*, there is no power on respondents' part to have petitioners totally denied access to the community for which the mall serves as a business district. This fact, however, is not determinative. In *Marsh* itself the precise issue presented was whether the appellant therein had the right, under the First Amendment, to pass out leaflets in the business district, since there was no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the residential areas of the town. While it is probable that the power to prevent trespass broadly claimed in *Marsh* would have encompassed such an incursion into the residential areas, the specific facts in the case involved access to property used for commercial purposes.

We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the "business district" is not under the same ownership. Here the roadways provided for vehicular movement within the mall and the sidewalks leading from building to building are the

functional equivalents of the streets and sidewalks of a normal municipal business district. The shopping center premises are open to the public to the same extent as the commercial center of a normal town. So far as can be determined, the main distinction in practice between use by the public of the Logan Valley Mall and of any other business district, were the decisions of the state courts to stand, would be that those members of the general public who sought to use the mall premises in a manner contrary to the wishes of the respondents could be prevented from so doing.

Such a power on the part of respondents would be, of course, part and parcel of the rights traditionally associated with ownership of private property. And it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality. All we decide here is that because the shopping center serves as the community business block "and is freely accessible and open to the people in the area and those passing through," *Marsh* v. *Alabama*, 346 U. S., at 508, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[9]

We do not hold that respondents, and at their behest the State, are without power to make reasonable regula-

[9] The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We

tions governing the exercise of First Amendment rights on their property. Certainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property. Thus where property is not ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether. See *Adderley* v. *Florida*, 385 U. S. 39 (1966). Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing "in such a manner as to obstruct or unreasonably to interfere with the free ingress or egress to and from any . . . county . . . courthouses." *Cameron* v. *Johnson*, *ante*, p. 4. Likewise it has been indicated that persons could be constitutionally prohibited from picketing "in or near" a court "with the intent of interfering with, obstructing, or impeding the administration of justice." *Cox* v. *Louisiana*, 379 U. S. 559 (1964).

In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. Thus it has been held that persons desiring to parade along city streets may be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public by regulating the time, place, and

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are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.

manner of the parade. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953). Compare *Kovacs* v. *Cooper*, 336 U. S. 77 (1949) (use of sound trucks making "loud and raucous noises" on public streets may be prohibited).

However, none of these cases is applicable to the present case. Because the Pennsylvania courts have held that "picketing and trespassing" can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot.[10] Likewise, *Adderley* furnishes no support for the decision below because it is clear that the public has virtually unrestricted access to the property at issue here. Respondents seek to defend the injunction they have obtained by characterizing the requirement that picketing to be carried on outside the Logan Mall premises as a regulation rather than a suppression of it. Accepting *arguendo* such a characterization, the question remains, under the First Amendment, whether it is a permissible regulation.

Petitioners' picketing was directed solely at one establishment within the shopping center. The berms surrounding the center are from 350 to 500 feet away from the Weis store. All entry onto the mall premises by customers of Weis, so far as appears, is by vehicle from the roads along which the berms run. Thus the placards bearing the message which petitioners seek to communicate to patrons of Weis must be read by those to

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[10] Compare *Cox* v. *New Hampshire, supra; Cox* v. *Louisiana, supra; Cameron* v. *Johnson, supra.* It should be noted that portions of the injunction, not contested here by petitioners, do accomplish precisely such a regulation of the picketing. See n. 4, *supra.*

whom they are directed either at a distance so great as to render them virtually indecipherable—where the Weis customers are already within the mall—or while the prospective reader is moving by car from the roads onto the mall parking areas via the entrance ways cut through the berms. In addition, the pickets are placed in some danger by being forced to walk along heavily traveled roads along which traffic moves constantly at rates of speed varying from moderate to high. Likewise, the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be were petitioners permitted to pass them out within the mall to pedestrians.[11] Finally, the require-

[11] Respondents argue that this case does not involve petitioners' right to distribute handbills, notwithstanding that the provision of the injunction prohibiting trespassing would seem to encompass entry for the purpose of distributing leaflets, because the petitioners were never engaged in handbilling within the mall. Similarly respondents suggest that the only question concerning picketing in this case relates to the picketing carried on in the parcel pickup area, since almost all the picketing occurred there prior to the issuance of the injunction. We reject the notion that an injunction that by its terms clearly prohibits entry onto the entire mall premises to picket should be given the reading suggested by the respondents simply because it is broader than the facts at the time required. The injunction is presently still operative and no limiting construction has been placed on it by the Pennsylvania courts. We see nothing to suggest that petitioners could not be immediately cited for contempt if they violated the plain terms of the injunction, whatever its relationship to their previous conduct may be. As for handbilling, the opinion of the trial court reveals that it was prepared to enjoin the handbilling being carried on along the berms had respondents so requested. Given that, the suggestion that the absolute prohibition against petitioners' trespassing on the mall does not include handbilling is likewise untenable. We do not treat petitioners' right to distribute leaflets separately in this opinion simply because a holding that petitioners are entitled to picket within the mall obviously extends to handbilling

ment that the picketing take place outside the shopping center renders it very difficult for petitioners to limit its effect to Weis only.[12]

It is therefore clear that the restraints on picketing and trespassing approved by the Pennsylvania courts here substantially hinder the communication of the ideas which petitioners seek to express to the patrons of Weis. The fact that the nonspeech aspects of petitioners' activity are also rendered less effective is not particularly compelling in light of the absence of any showing, or reliance by the state courts thereon, that the patrolling accompanying the picketing sought to be carried on was significantly interfering with the use to which the mall property was being put by both respondents and the general public.[13] As we observed earlier, the mere fact that speech is accompanied by conduct does not mean that the speech can be suppressed under the guise of prohibiting the conduct. Here it is perfectly clear that a prohibition against trespass on the mall operates to bar all speech within the shopping center to which respondents object. Yet this Court stated many years ago, "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

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as well and also because petitioners themselves make no separate issue of it.

[12] Petitioners point out that they could conceivably find themselves charged with conducting an illegal secondary boycott if they do not comply with the rules laid down by the NLRB and the courts governing common situs picketing. Compare *Electrical Workers Local 761* v. *NLRB*, 366 U. S. 667 (1961).

[13] Moreover, the parts of the injunction not contested by petitioners already went a long way towards preventing any such interference. See n. 4, *supra*.

The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under state law to prohibit any use of their property by others without their consent. However, unlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.

The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.[14]

These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar

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[14] Kaylin, A Profile of the Shopping Center Industry, Chain Store Age, May 1966, at 17.

criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.

Therefore, as to the sufficiency of respondents' ownership of the Logan Valley Mall premises as the sole support of the injunction issued against petitioners, we simply repeat what was said in *Marsh* v. *Alabama*, 326 U. S., at 506, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Logan Valley Mall is the functional equivalent of a "business block" and for First Amendment purposes must be treated in substantially the same manner.[15]

The judgment of the Supreme Court of Pennsylvania is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[15] A number of state courts have reached similar conclusions as to shopping centers. See, *e. g.*, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local 31*, 61 Cal. 2d 766, 394 P. 2d 921 (1964), cert. denied, 380 U. S. 906 (1965); *Moreland Corp.* v. *Retail Store Employees Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876 (1962). Compare *Amalgamated Clothing Workers* v. *Wonderland Shopping Center, Inc.*, 370 Mich. 547, 122 N. W. 2d 785 (1963) (affirming four-to-four a lower court holding that handbilling in a shopping center is protected by the First Amendment).

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, v. Logan Valley Plaza, Inc., et al. } On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Douglas, concurring.

Picketing on the public walkways and parking area in respondents' shopping center presents a totally different question from an invasion of one's home or place of business. While Logan Valley Mall is not dedicated to public use to the degree of the "company town" in *Marsh* v. *Alabama*, 326 U. S. 501, it is clear that respondents have opened the shopping center to public uses. They hold out the mall as "public" for purposes of attracting customers and facilitating delivery of merchandise. Picketing in regard to labor conditions at the Weis Supermarket is directly related to that shopping center business. Why should respondents be permitted to avoid this incidence of carrying on a public business in the name of "private property"? It is clear to me that they may not, when the public activity sought to be prohibited involves constitutionally protected expression respecting their business.

Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated. See *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776–777 (concurring opinion); *Hughes* v. *Superior Court*, 339 U. S. 460, 464–465; *Building Service Union* v. *Gazzam*, 339 U. S. 532, 536–537. Thus, the provisions

of the injunction in this case which prohibit the picketers from interfering with employees, deliverymen, and customers are proper. It is said that the picketers may be banished to the publicly owned berms, several hundred feet from the target of their criticism. But that is to make "private property" a sanctuary from which some members of the public may be excluded merely because of the ideas they espouse. Logan Valley Mall covers several acres and the number of picketers at any time has been small. The courts of Pennsylvania are surely capable of fashioning a decree that will ensure noninterference with customers and employees, while enabling the union members to assemble sufficiently close to Weis' market to make effective the exercise of their First Amendment rights.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, v. Logan Valley Plaza, Inc., et al. | On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Black, dissenting.

While I generally accept the factual background of this case presented in the Court's opinion, I think it is important to focus on just where this picketing, which was enjoined by the state courts, was actually taking place. The following extract is taken from the trial court's "Findings of Fact": [1]

> "(7) . . .
>
> "(a) small groups of men and women wearing placards . . . walked back and forth in front of the Weis supermarket, more particularly *in the pick-up zone* adjacent to the covered porch [emphasis added];
>
> "(b) occasional picketing as above described has taken place *on the covered porch itself* [emphasis added]";

Respondent Weis Markets, Inc., the owner-occupant of the supermarket here being picketed, owns the real property on which it constructed its store, porch, and parcel pick-up zone. Respondent Logan Valley Plaza, Inc., owns the other property in the shopping center, including the large area which has been paved and marked off

[1] This appears in the opinion of the Court of Common Pleas of Blair County, Pennsylvania, dated February 14, 1966, and unreported.

as a general parking lot for customers of the shopping center.

Anyone familiar with the operations of a modern-day supermarket knows the importance of the so-called "pick-up zone"—an area where the frequently numerous bags of groceries bought in the store can be loaded conveniently into the customers' cars. The phenomenon of the supermarket combined with widespread ownership of automobiles and refrigeration facilities has made the purchase of large quantities of groceries on a single shopping trip a common occurrence in this country. And in line with this trend the stores have had to furnish adequate loading areas and facilities including in many instances, such as here for example, extra employees to assist in loading customers' cars. Respondent Weis' parcel pick-up zone is fairly typical of the type of loading area that has been provided: it is located alongside the front of the store and is 4 to 5 feet wide, 30 to 40 feet in length, and is marked off with bold double yellow lines; the words "Parcel Pick-Up" are printed in large letters in the zone. Testimony at trial showed that this pick-up area was used "strictly for customers to come and enter to pick up their parcels which they had purchased. . . . They drive into this particular area, and there the groceries are loaded into the cars by [Weis employees] on . . . pick-up duty."

It seems clear to me, in light of the customary way that supermarkets now must operate, that pick-up zones are as much a part of these stores as the inside counters where customers select their goods or the check-out and bagging sections where the goods are paid for. I cannot conceive how such a pick-up zone, even by the wildest stretching of *Marsh* v. *Alabama*, 326 U. S. 501, could ever be considered dedicated to the public or to pickets. The very first section of the injunction issued by the trial court in this case recognizes this fact and is aimed

only at protecting this clearly private property from trespass by the pickets. Thus the order of the court separately enjoins petitioners from:

> "(a) Picketing and trespassing upon the private property of the plaintiff Weis Markets, Inc., Store No. 40, located at Logan Valley Mall, Altoona, Pennsylvania, including as such private property the storeroom, porch and parcel pick-up area."

While there is language in the majority opinion which indicates that the state courts may still regulate picketing on respondent Weis' private property,[2] this is not sufficient. I think that this Court should declare unequivocally that Section (a) of the lower court's injunction is valid under the First Amendment and that petitioners cannot, under the guise of exercising First Amendment rights, trespass on respondent Weis' private property for the purpose of picketing.[3] It would be just as sensible for this Court to allow the pickets to stand on the checkout counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pick-up zone which interferes with customers' loading of their cars. At the very least, this wholly severable part

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[2] The majority opinion contains the following statement: "Because the Pennsylvania courts have held that 'picketing and trespassing' can be prohibited absolutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of picketers within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pickup area and parking lot." P. —, *supra*. This statement ignores the fact that the injunction order of the Common Pleas Court contains separately designated sections which are easily divisible.

[3] Since the majority opinion does not reach any issue under the National Labor Relations Act, 29 U. S. C. § 147, neither do I. My declaration of validity is concerned with the First and Fourteenth Amendments. I do not find that the injunction, and most importantly § (a), violates any First Amendment rights.

of the injunction aimed at the pick-up zone should be affirmed by the Court as valid under the First Amendment. And this is in fact the really important part of the injunction since, as the Court's opinion admits, "the picketing was carried out almost entirely in the parcel pickup area and that portion of the parking lot immediately adjacent thereto."

I would go further, however, and hold that the entire injunction is valid.[4] With the exception of the Weis property mentioned above, the land on which this shopping center (composed of only two stores at the time of trial and approximately 17 now) is located is owned by respondent Logan Valley Plaza, Inc. Logan has improved its property by putting shops and parking spaces thereon for the use of business customers. Now petitioners contend that they can come onto Logan's property for the purpose of picketing and refuse to leave when asked, and that Logan cannot use state trespass laws to keep them out. The majority of this Court affirms petitioners' contentions. But I cannot accept them, for I believe that whether this Court likes it or not the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." This means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

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[4] See n. 3, *supra*.

In affirming petitioners' contentions the majority opinion relies on *Marsh* v. *Alabama, supra,* and holds that respondents' property has been transformed to some type of public property. But *Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town. The particular company town involved was Chickasaw, Alabama, which, as we stated in the opinion, except for the fact that it "is owned by the Gulf Shipbuilding Corporation . . . has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. Again toward the end of the opinion we emphasized that "the town of Chickasaw does not function differently from any other town." 326 U. S., at 508. I think it is fair to say that the basis on which the *Marsh* decision rested was that the property involved encompassed an area that for all practical purposes had been turned into a town; the area had all the attributes of a town and was indistinguishable from any other town in Alabama. I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama. There are no homes, there is no sewage disposal plant, there is not even a post office on this private property which the Court now considers the equivalent of a "town."[5] Indeed, at the time this injunction was issued, there were only two stores on the property. Now there are supposed to be about 17, but they are all conceded to be "commercial establishments." The

[5] In *Marsh* v. *Alabama, supra,* a deputy of the Mobile Sheriff, paid by the company, served as the town's policeman. We are not told whether the Logan Valley Plaza shopping center had its own policeman.

remainder of the property in the center has been laid out as a large parking lot with individually marked parking spaces provided for business customers. All I can say is that this sounds like a very strange "town" to me.

The majority opinion recognizes the problem with trying to draw too close an analogy with *Marsh*, but faces a dilemma in that *Marsh* is the only possible authority for treating admittedly privately owned property the way the majority does. Thus the majority opinion concedes that "the respondents here do not own the surrounding residential property and do not provide municipal services therefor." But that is not crucial, according to the majority, since the petitioner in *Marsh* was arrested in the business district of Chickasaw. The majority opinion then concludes that since the petitioner in *Marsh* was given access to the business district of a company town, the petitioners in this case should be given access to the shopping center which was functioning as a business district. But I respectfully suggest that this reasoning completely misreads *Marsh* and begs the question. The question is under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken on *all* the attributes of a town, *i. e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." 326 U. S., at 502. I can find nothing in *Marsh* which indicates that if one of these features is present, *e. g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

In allowing the trespass here, the majority opinion indicates that Weis and Logan invited the public to the shopping center's parking lot. This statement is contrary to common sense. Of course there was an implicit

invitation for customers of the adjacent stores to come and use the marked off places for cars. But the whole public was no more wanted there than they would be invited to park free at a pay parking lot. Is a store owner or several of them together less entitled to have a parking lot set aside for customers than other property owners? To hold that store owners are compelled by law to supply picketing areas for pickets to drive store customers away is to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country. And of course picketing, that is patroling, is not free speech and not protected as such. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460. These pickets do have a constitutional right to speak about Weis' refusal to hire union labor, but they do not have a constitutional right to compel Weis to furnish them a place to do so on his property. *Cox* v. *Louisiana*, 379 U. S. 559; *Adderley* v. *Florida*, 385 U. S. 39; *Cameron* v. *Johnson*, — U. S. —.

For these reasons I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, v. Logan Valley Plaza, Inc., et al. } On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice Harlan, dissenting.

The petitioner argues for reversal of the decision below on two separate grounds: first, that petitioner's picketing was protected by the First Amendment from state injunctive interference of this kind; second, that the Pennsylvania courts have strayed into a sphere where the power of initial decision is reserved by federal labor laws to the National Labor Relations Board. I think that, if available, the second or "pre-emption" ground would plainly be a preferable basis for decision. Because reliance on pre-emption would invoke the authority of a federal statute through the Constitution's Supremacy Clause, it would avoid interpretation of the Constitution itself, which would be necessary if the case were treated under the First Amendment. See, *e. g., Zschernig* v. *Miller*, 389 U. S. 428, 443, 444–445 (concurring opinion of the writer). Dependence on pre-emption would also assure that the Court does not itself disrupt the statutory scheme of labor law established by the Congress, a point to which I shall return.

On the merits, it seems clear from the facts stated by the Court, see *ante*, at —, and from our past decisions [1]

[1] See, *e. g., Construction Laborers* v. *Curry*, 371 U. S. 542, 546–548; *Hotel Employees* v. *Sax*, 358 U. S. 270; *Youngdahl* v. *Rainfair*, 355 U. S. 131, 139; *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105,

that the petitioner has a substantial pre-emption claim. However, upon examination of the record I have come reluctantly to the conclusion that this Court is precluded from reaching the merits of that question because of the petitioner's failure to raise any such issue in the Pennsylvania Supreme Court. The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. Section 1257 of Title 28, which defines this Court's certiorari jurisdiction, states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."

Since the Pennsylvania Supreme Court did not advert in its majority opinion to the pre-exemption issue,[2] it is necessary to determine whether that question was "specially set up or claimed" within the meaning of § 1257. In deciding that question, it is relevant and usually sufficient to ask whether the petitioner satisfied the state rules governing presentation of issues. See, *e. g.*, *Beck* v. *Washington*, 369 U. S. 541, 549–554; *Wolfe* v. *North*

112–114; *NLRB* v. *Stowe Spinning Co.*, 336 U. S. 226, 229–232; cf. *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 24–25. See also *Marshall Field & Co.*, 98 N. L. R. B. 88, 93, enforced as modified *sub nom. Marshall Field & Co.* v. *NLRB*, 200 F. 2d 375, 380.

[2] Where the highest state court has actually ruled on a federal question, this Court's concern with the proper raising of the question in the state court disappears. See, *e.g.*, *Raley* v. *Ohio*, 360 U. S. 423, 436; *Whitney* v. *California*, 274 U. S. 357, 360–361; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134.

Carolina, 364 U. S. 177, 195; *John* v. *Paullin*, 231 U. S. 583, 585.[3] Rule 59 of the Pennsylvania Supreme Court provides:

> "The [appellant's] statement of the questions involved must set forth each question separately, in the briefest and most general terms . . . . This rule is to be considered in the highest degree mandatory, admitting no exception; ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved."

The Pennsylvania Supreme Court has consistently held that it will not consider points not presented in the manner prescribed by this rule, and that such points are regarded as abandoned or waived.[4] In this case, the petitioner's statement of questions involved did not refer to the possibility of federal pre-emption,[5] and of course the Pennsylvania Supreme Court's majority opinion did not mention it either. A similar rule of the Washington

[3] The only circumstances in which a federal claim will be entertained despite the petitioner's failure to raise it below in the prescribed manner are when the State's rules do not afford a reasonable opportunity for a hearing on the federal issue, see, *e.g.*, *Central Union Tel. Co.* v. *Edwardville*, 269 U. S. 190, 194–195, or are applied in a discriminatory fashion to evade the federal claim, see, *e.g.*, *Hartford Life Ins. Co.* v. *Johnson*, 249 U. S. 490, 493. No such allegation is made in this case.

[4] See, *e.g.*, *Dunmore* v. *McMillan*, 396 Pa. 472, 152 A. 2d 708; *Kuhns* v. *Brugger*, 390 Pa. 331, 135 A. 2d 395; *Kerr* v. *O'Donovan*, 389 Pa. 614, 134 A. 2d 213.

[5] The petitioner stated that the question involved was;

"Did the lower court err in granting a Preliminary Injunction . . . where in a suit in equity by the owner of a shopping center and one of its tenants it is established that the appellant-union peacefully picketed near tenant's building within the confines of said shopping center; that no picketing efforts were directed toward the shopping center or other tenants; that picketing efforts were merely to inform the public of the labor dispute?"

Supreme Court was involved in *Beck* v. *Washington*, *supra*, and we held that when a defendant has failed to comply with such a rule "the argument cannot be entertained here under an unbroken line of precedent. *E. g.*, *Ferguson* v. *Georgia*, 365 U. S. 570, 572; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248." 369 U. S., at 553.[6] I am therefore led to conclude that we have no jurisdiction to consider the question of pre-emption.[7]

Turning to the First Amendment question, I believe that in the circumstances it is not an appropriate one for this Court to decide. This controversy arose in the course of a labor union's efforts to achieve labor goals by informational picketing. Although no pre-emption question is properly before us, I do think that we can take notice that this is an area in which Congress has enacted detailed legislation, see, *e. g.*, 29 U. S. C. § 158 (b)(7)(C), and has set up an administrative agency to resolve such disputes in the first instance. The reason why it was deemed necessary to fashion the doctrine of pre-emption under the federal labor laws was that it would be intolerably disruptive if this statutory scheme were interpreted differently by state and federal courts. See, *e. g.*, *Garner* v. *Teamsters Union*, 346 U. S. 485, 490–491; *San Diego Unions* v. *Garmon*, 359 U. S. 236, 242–245. It seems to me that a similar objection applies to this Court's resolution of such disputes by resort to the Constitution. For the establishment by this Court of

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[6] See also *Wolfe* v. *North Carolina*, 364 U. S. 177, 195; *Parker* v. *Illinois*, 333 U. S. 571; *CIO* v. *McAdory*, 325 U. S. 472, 477.

[7] The petitioner contends that this Court has jurisdiction to consider the pre-emption issue despite the petitioner's failure to raise it below, because the question is one of "subject matter jurisdiction." Although some implied support for this proposition may be found in *Seaboard Airline R. Co.* v. *Daniel*, 333 U. S. 118, 122–123, I am unable to perceive how the nature of the federal question involved can affect the specific limitation on our jurisdiction contained in 28 U. S. C. § 1257.

a rigid constitutional rule in a field where Congress has attempted to strike a delicate balance between competing economic forces, and in circumstances where we cannot know how the controversy would be settled by Congress' chosen instrument, may also have a considerable disruptive effect. I therefore believe that we should exercise our discretion not to reach the First Amendment issue, and that we should dismiss the writ as improvidently granted. Such a disposition would not be unfair to the petitioner, since the failure to bring the preemption question properly before us was its own.

SUPREME COURT OF THE UNITED STATES

No. 478.—October Term, 1967.

Amalgamated Food Employees Union Local 590 et al., Petitioners, *v.* Logan Valley Plaza, Inc., et al. | On Writ of Certiorari to the Supreme Court of Pennsylvania.

[May 20, 1968.]

Mr. Justice White, dissenting.

The reason why labor unions may normally picket a place of business is that the picketing occurs on public streets which are available to all members of the public for a variety of purposes that include communication with other members of the public. The employer businessman cannot interfere with the pickets' communication because they have as much right to the sidewalk and street as he does and because the labor laws prevent such interference under various circumstances; the Government may not interfere on his behalf, absent obstruction, violence, or other valid statutory justification, because the First Amendment forbids official abridgment of the right of free speech.

In *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the company town was found to have all of the attributes of a state-created municipality and the company was found effectively to be exercising official power as a delegate of the State. In the context of that case, the streets of the company town were as available and as dedicated to public purposes as the streets of an ordinary town. The company owner stood in the shoes of the State in attempting to prevent the streets from being used as public streets are normally used.

The situation here is starkly different. As Mr. Justice Black so clearly shows, Logan Valley Plaza is not

a town but only a collection of stores. In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pick-up zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. It may be more convenient for cars and trucks to cut through the shopping center to get from one place to another, but surely the Court does not mean to say that the public may use the shopping center property for this purpose. Even if the Plaza has some aspects of "public" property, it is nevertheless true that some public property is available for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities. *E. g., Adderley* v. *Florida,* 385 U. S. 39 (1966). The point is that whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.

The most that can be said is that here the public was invited to shop, that except for their location in the shopping center development the stores would have fronted on public streets and sidewalks, and that the shopping center occupied a large area. But on this premise the parking lot, sidewalks, and driveways would be available for all those activities which are usually

permitted on public streets. It is said that Logan Valley Plaza is substantially equivalent to a business block and must be treated as though each store was bounded by a public street and a public sidewalk. This rationale, which would immunize nonobstructive labor union picketing, would also compel the shopping center to permit picketing on its property for other communicative purposes, whether the subject matter concerned a particular business establishment or not. Nonobstructive handbilling for religious purposes, political campaigning, protests against government policies—the Court would apparently place all of these activities carried out on Logan Valley's property within the protection of the First Amendment, although the activities may have no connection whatsoever with the views of the Plaza's occupants or with the conduct of their businesses.

Furthermore, my Brother BLACK is surely correct in saying that if the invitation to the public is sufficient to permit nonobstructive picketing on the sidewalks, in the pick-up zone, or in the parking area, only actual interference with customers or employees should bar pickets from quietly entering the store and marching around with their message on front and back.

It is not clear how the Court might draw a line between "shopping centers" and other business establishments which have sidewalks or parking on their own property. Any store invites the patronage of members of the public interested in its products. I am fearful that the Court's decision today will be a license for pickets to leave the public streets and carry out their activities on private property, as long as they are not obstructive. I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well. I do not think the First Amendment, which bars only official interferences with speech, has this reach. In *Marsh*, the company

ran an entire town and the State was deemed to have devolved upon the company the task of carrying out municipal functions. But here the "streets" of Logan Valley Plaza are not like public streets; they are not used as thoroughfares for general travel from point to point, for general parking, for meetings, or for Easter parades.

If it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case. But that is not the basis on which the Court proceeds, and I therefore dissent.